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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE

Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

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September 11, 1979

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The petitioners are the City of Milwaukee, The Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee. They pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on April 26, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals dated April 26, 1979 is reported at 599 F.2d 151, and is reproduced in the Appendix to this petition, *infra* (bound separately), at A-1 *et seq.* The opinion of the Court of Appeals was accompanied by an unpublished order dated April 26, 1979 which was not officially reported, but is unofficially reported at 13 E.R.C. 1069 and reproduced in the Appendix to this petition, *infra,* at B-1 *et seq.* An order denying a petition by the State of Illinois for a rehearing was entered by the Court of Appeals on June 14, 1979 and is

reproduced in the Appendix to this petition, *infra,* at C-1 *et seq.* The judgment order entered by the United States District Court for the Northern District of Illinois on November 15, 1977 is reproduced in the Appendix to this petition, *infra,* at D-1 *et seq.* A stipulation between the parties dated November 14, 1977 concerning the District Court's November 15, 1977 judgment order is reproduced in the Appendix to this petition, *infra,* at E-1 *et seq.* The opinion of the District Court at the conclusion of the trial on July 29, 1977 was not reported and is reproduced in the Appendix to this petition, *infra,* at F-1 *et seq.* The opinion of the District Court dated November 1, 1973 denying petitioners' motion to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure is reported at 366 F.Supp. 298 and is reproduced in the Appendix to this petition, *infra,* at G-1 *et seq.* The opinion of the District Court dated November 16, 1972 denying petitioners' motion to dismiss for lack of personal jurisdiction and improper venue was not officially reported but is unofficially reported at 4 E.R.C. 1849, and is reproduced in the Appendix to this petition, *infra,* at H-1.

This proceeding has its genesis in this Court's decision in *Illinois v. Milwaukee,* 406 U.S. 91 (1972), reproduced in the Appendix to this petition, *infra,* at I-1 *et seq.*

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on April 26, 1979. A timely petition for rehearing was denied on June 14, 1979. This petition for certiorari has been filed within 90 days of the date of that denial. This Court's jurisdiction is invoked under the provisions of 28 U.S.C. §1254(1) and Rule 22(3) of the Supreme Court Rules.

QUESTIONS PRESENTED

I. Where Congress has now adopted the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act of 1977, acts intended to provide uniformity, finality and an effective remedy to all persons including states in the field of abatement of water pollu-

tion and to assure that similar point sources with similar characteristics will meet similar effluent limitations by providing for establishment of regulations to set effluent control limitations or standards by an agency that is best equipped for the purpose by reason of specialization, experience and expertise, has the time come when these new federal laws and new federal regulations adopted thereunder, control the federal common law?

II. Where the trial court found that: (1) fecal coliform counts on Illinois' Lake Michigan beaches failed to demonstrate any pollution coming from defendants; (2) there is no evidence of any outbreak of water-related diseases in Illinois; (3) there is no evidence that any specific algal taste or odor problem is attributable to defendants; and (4) it is impossible to measure accurately any effect on the lake caused by defendants' discharges or to measure accurately the diminution in the amount of nutrients in the lake if they were altogether discontinued, and where plaintiffs failed to perform studies which they could and should have performed to determine whether pathogens and pollutants in defendants' sewage effluents actually reached plaintiffs' waters, may the courts conclude that a federal common law nuisance has been established?

III. Where the theoretical possibility of exposure to enteroviral diseases, which have short incubation periods, has existed for many decades, but the trial court expressly found that there is no evidence of the outbreak of any enteroviral disease, may the courts hold that a federal common law nuisance has been established based solely upon the theoretical possibility?

IV. May the courts hold that defendants are creating a federal common law nuisance on the basis of express findings by the trial court that: (1) defendants' nutrient discharges to the lake cannot be isolated out, either legally or factually; (2) balancing the equities is really difficult to apply because each dollar of expenditure for better sewage

treatment cannot be shown to result in a specific amount of benefit to the lake; (3) there is no evidence of defendants having a present effect on fish life; (4) there is no evidence of any specific algal taste or odor problem attributable to defendants; and (5) nutrients from many sources, only some of which nutrients emanate from defendants, are causing accelerated eutrophication of the lake?

V. Where federal statutory and administrative provisions establish a federal policy to require a cost-effective approach to pollution control, may the trial court expressly refuse to consider costs and cost-effective considerations, and instead fashion a remedy without any regard whatsoever to such matters?

VI. Where the defendants did nothing in the forum state and did nothing to avail themselves of the law of or the privilege of conducting activities within that state, did the court of the forum state have personal jurisdiction over the defendants and did venue in the action properly lie in the Northern District of Illinois?

STATUTORY PROVISIONS INVOLVED

1. Section 17 of the Illinois Civil Practice Act, Ill. Rev. Stat. ch. 110, §17 (1971), provided in pertinent part as follows at the date the instant action was commenced (it has not been amended in any pertinent respect since then):

> "(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person . . . to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any such acts:
>
> * * *

(b) The commission of a tortious act within this State."

2. 28 U.S.C. 1391(b) states:

"A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

3. Also involved in this proceeding is the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§1251-1376. The Act is lengthy and, therefore, its pertinent provisions are set forth in the Appendix to this petition, *infra,* at J-1 *et seq.*

STATEMENT OF THE CASE

This case has its origin in the Supreme Court's decision in *Illinois v. Milwaukee,* 406 U.S. 91 (1972). This petition presents for decision unsettled legal issues of paramount significance to every municipal corporation, every state, and the nation at large. It presents the first opportunity for this Court to define the scope of its decision in *Illinois v. Milwaukee* in light of the subsequent enactment of the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act of 1977, and implementation of the nationwide regulatory and funding program created by Congress in that legislation. The result in this case will determine the timing of and the expenditure of literally hundreds of millions of dollars by your petitioners and will affect the expenditure of tens of billions of dollars in the nation.

In *Illinois v. Milwaukee, supra,* the State of Illinois filed a motion for leave to file a complaint under the Supreme Court's original jurisdiction against four cities and two local sewerage commissions of the State of Wisconsin, alleging that the defendants were polluting Lake Michigan, an interstate body of water, and seeking the abatement of the alleged public nuisance. The Court denied the motion for leave to file under the Court's

original jurisdiction, without prejudice to the right of the State of Illinois to file an action in an appropriate United States District Court. The Court noted that the basis of such an action would be "federal common law" (406 U.S. at 102, App. I-11); that, as of the time of the decision, the federal statutes and regulations provided only for "long-drawn-out" abatement procedures which were not inconsistent with the application of a federal common law to abate a public nuisance in interstate or navigable waters (406 U.S. at 103, App. I-12); *but* that "new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." (406 U.S. at 107, App. I-16).

On May 19, 1972, shortly after the Supreme Court's decision, the State of Illinois commenced the present action in the United States District Court for the Northern District of Illinois.

Five months later, on October 18, 1972, Congress enacted PL 92-500, the Federal Water Pollution Control Act Amendments of 1972 (the "1972 Act").[1] That enactment substantially replaced the previous language of the Federal Water Pollution Control Act referred to in the Supreme Court's decision, including the Water Quality Act of 1965, the Clean Water Restoration Act of 1966, and the Water Quality Improvement Act of 1970, all of which had been amendments to the Federal Water Pollution Control Act first passed in 1948.

On December 27, 1977, shortly after the entry of the judgment in this action, Congress enacted and the President signed the Clean Water Act of 1977 (the "1977 Act"), PL 95-217, which amended the FWPCA in certain important respects.

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[1] The Federal Water Pollution Control Act, as amended, is codified in 33 U.S.C. §§1251-1376. For ease of cross-reference, the U.S.C. § numbers will be set out in parentheses after the Act's section numbers; viz.: Sec. 301 (§1311). The Federal Water Pollution Control Act, as amended, is referred to herein as either "the Act" or "FWPCA".

Among many other changes, Section 41 of the 1977 Act added new Sec. 217 (§1297):

> "Any guidelines for cost-effectiveness analysis published by the Administrator under this title shall provide for the identification and selection of cost effective alternatives to comply with the objective and goals of this Act and sections 201(b), 201(d), 201(g)(2)(A), and 301(b)(2)(B) [§§1281(b), 1281(d), 1281(g)(2)(A), and 1311(b)(2)(B)] of this Act."

Thus, Congress had dealt with the precise subject matter of this action *before* judgment was entered below and refined the Congressional mandate *after* judgment was entered.

The District Court entered judgment in favor of the plaintiffs which ordered essentially two basic remedies (App. D-1 *et seq.*). The first required your petitioners to treat all sewage at all times in compliance with effluent limitations many times more stringent than those imposed pursuant to the FWPCA and requiring an additional treatment process known as "advanced wastewater treatment" to be constructed and operated over and above the statutorily mandated "secondary treatment".[2] The second basic remedy required your petitioners to construct a sewage conveyance, storage and treatment facility which would have the capacity to "eliminate" all overflows of raw sewage from combined sanitary and storm sewers during periods of wet weather. The system was to be large enough to permit advanced waste treatment of water from any storm up to the size of the largest storm in Milwaukee's historical record and to permit the treatment of any overflows which may conceivably occur from a storm larger than the largest storm in that history with "bar screens, followed by drum screens, followed by chlorination prior to discharge." The Court of Appeals dealt with the two basic parts of the District Court Judgment separately. It re-

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[2] See App. A-40 for a description of "secondary treatment." Generally, "advanced wastewater treatment" refers to tertiary treatment processes requiring additional capital facilities.

versed the District Court's order insofar as it imposed effluent limitations more stringent than those required by FWPCA, which reversal eliminated the need to construct advanced waste treatment facilities required to meet the reversed effluent limitations. However, the Court of Appeals affirmed the District Court's order to the extent that the order required the "elimination" of all sewage overflows during wet weather periods, thereby leaving intact the need to undertake a massive construction program to build additional sewage collection, transport and treatment facilities.

A. *Control* of Overflows is Mandated by Congress; *Elimination* of Overflows was Ordered by the Courts Below.

The concept of "control" of overflows as mandated by Congress versus the concept of "elimination" of sewer overflows reflects and describes the basic and fundamental difference between the cost effective solution to sewer overflows enacted by Congress and the remedy ordered by the courts below. Any sewer system including its treatment plants has inherent storage capacity. When that capacity is exceeded, it overflows. But, the process is not that simple. Sewer systems may be "separate" systems in which only sanitary sewage is collected and treated or "combined" systems which gather both sanitary sewage and storm water runoff for treatment. Because any sewer system has the ability to contain and process a substantial volume in the pipes, conduits, tunnels and plants which constitute the system, invariably a capacity greater than the dry weather flow to the system, it follows that such overflows from a system as may occur, usually in its combined sewer areas, happen when the system is affected by a storm event. Overflows for that reason are caused by storm water quantities that enter the system over and above the normal dry weather flows. This in turn means that when an overflow occurs in a "controlled" system, it occurs primarily after the system and its stored pollutants have been or are in the course of being flushed to and treated in the treatment plants of the system; the overflowing liquids from a "controlled" system are therefore in large part storm water runoff. Congress and the administrative

agency created by federal statute recognize this factor in providing for "control" of combined sewer overflows on a cost-effective basis. In essence, the permits granted under FWPCA establish a level of protection of the nation's waters by mandating sufficient volume capacity in a "controlled" combined sewer system to prevent overflows until a particular magnitude of storm event occurs, usually the "six month" or "two year" storm depending on the specifics of the system and the waters into which the discharge will be made. The amount of control imposed, i.e. the storm event planned for, is related to the costs of the degree of control required to meet the water quality requirements of the receiving waters and the other particular circumstances of the system being controlled. In contrast to the legislative "control" approach, the approach of the courts below was to *eliminate* combined sewer overflows by ordering mammoth storage capacity with attendant pumping and other facilities regardless of cost and regardless of the fact that the last vestiges of overflows eliminated are only prevented at enormous cost.

Essentially, Congress and the regulatory permit system have recognized the law of diminishing returns and provide for control of overflows from combined sewer systems so as to prevent the discharge of the vast majority of pollutants to the nation's waters while keeping costs in perspective. The courts below, however, have ignored that concept in favor of total elimination without regard to costs or benefits secured.

B. Procedural History

As stated previously, this case was commenced on May 19, 1972, shortly after this Court's decision in *Illinois v. Milwaukee, supra.* The complaint was served upon the defendants pursuant to the Illinois long-arm statute, Ill. Rev. Stat. ch. 110, §17 (1971). Subsequent to service of the complaint the defendants moved to dismiss the action on the ground that the trial court lacked jurisdiction over the person of the defendants and that venue of the action did not properly lie in the Northern District of Illinois. The District Court denied these motions. *Illinois v. Milwaukee,* 4 E.R.C. 1849 (N.D. Ill. 1972) (App. H-1

et seq.). The defendants then moved to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. This motion was also denied. *Illinois v. Milwaukee,* 366 F.Supp. 298 (N.D. Ill. 1973) (App. G-1 *et seq.*).

Trial to the court commenced on January 11, 1977. It spanned six months, produced over 14,000 pages of transcript, hundreds of exhibits, and focused upon highly technical subject matter requiring extensive use of expert testimony to explain and interpret complex scientific issues (the plaintiff's experts being limited to theories and the defendant's witnesses reviewing actual tests performed by them as well as the applicable scientific theories). It was in this setting that at the conclusion of the case the trial court, while permitting oral argument, rejected briefs and dictated a decision from the bench. In the trial court's words:

> "Ordinarily, when the trier of fact weighs evidence and attempts to come to factual conclusions, he does so in the light of his own experience and his own observations and his own common sense. Not only is this proper to do, it is something that we specifically instruct juries to do in every jury case.
>
> The nature of the subject matter here, however, is such that my own experience and observations in life are of relatively little use to me. It is well known to all of us that the arcane subject matter of some of the expert testimony in this case was sometimes over the heads of all of us to one height or another. I would be certainly less than candid if I did not acknowledge that my grasp of some of the testimony was less complete than I would like it to be, but short of enrolling in a university course directed toward a reorientation of my entire education and spending the years that that would involve, I know of no remedy for the problem." (App. F-3 and 4)

Significantly, the trial court did not as a "remedy for the problem" defer to the expertise of the administrative body set up by Congress to deal with the subject.

In subsequent hearings before the District Court held on September 9, 1977 and November 14, 1977, where the time within which to complete the ordered remedy was under consideration, the District Court clearly indicated that the two previously imposed requirements of the court, i.e. (1) to completely "eliminate" all overflows; and (2) to meet the effluent limitations specified by the court, were both to be applicable without respect to their costs, without benefit of any cost-effective analysis and without regard to the availability of federal funding under FWPCA, which funding is limited to cost-effective solutions to pollution control (Transcript of September 9, 1977 hearing before the District Court, pp. 107-111; Transcript of November 14, 1977 hearing before the District Court, pp. 38 and 56).

C. Description of the Metropolitan Milwaukee Sewerage System

The defendant Commissions[3] and the City of Milwaukee are each municipal bodies corporate organized and existing under the laws of the State of Wisconsin.

Although each has separate functions, taken together the defendant Commissions and the City of Milwaukee construct, operate and maintain sewer facilities which serve the County of Milwaukee, Wisconsin (except for the City of South Milwaukee). The area served ("Metropolitan Milwaukee Area") is approximately 420 square miles and has a population in excess of 1 million persons (Trial Transcript pp. 9262-9267).

The facilities operated by the defendants to serve the Metropolitan Milwaukee Area include a series of sewer systems

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3 Wis. Stat. §§59.96(5)(a) and 62.60-.67 (1977).

and two sewage treatment plants. The Metropolitan Sewerage Commission of the County of Milwaukee ("Metropolitan Commission") constructs sewers in the Metropolitan Milwaukee Area outside of the City of Milwaukee. Upon completion, sewers constructed by the Metropolitan Commission are transferred to the Sewerage Commission of the City of Milwaukee ("City Commission") which thereafter operates and maintains them along with sewers which it has constructed in the City of Milwaukee. The City Commission also operates and maintains the two sewage treatment plants. The City of Milwaukee operates and maintains some sewers in the City of Milwaukee.

The two sewage treatment plants, which are respectively 25 and 39 miles from the Illinois border, are designed to provide "secondary" treatment for sewage effluent discharges (e.g., D.Ex. 84; P.Ex. 89-90). The effluent discharge from the main sewage treatment plant is made to Lake Michigan inside of a man-made breakwater three miles from the nearest Milwaukee drinking water intake (D.Ex. 504). Other sewage effluent discharges are made from the other plant directly into the lake approximately eight miles from the nearest Milwaukee drinking water intake and from time to time directly into tributary streams of Lake Michigan from designated "over-flow" points in the sewage collection system. *(Id.).*[4] Even with this close juxtaposition of drinking water intakes and effluent discharge points, there is no record showing that Milwaukee has experienced enteroviral or bacterial epidemics.

In 1974 the defendant City Commission and the City of Milwaukee applied to the State of Wisconsin Department of Natural Resources ("DNR") for permits to discharge the

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[4] "Overflow" is defined in the Judgment Order from which this appeal arises as "a crossover, bypass, diversion structure, relief structure, pump station or any other device or mechanism by which human fecal waste is discharged directly or indirectly to public streams, rivers or lakes without collection and treatment" according to specified standards (App. D-2).

described sewage effluent into Lake Michigan and certain tributary streams in Milwaukee County. Such applications were made pursuant to FWPCA, and procedures adopted thereunder.

Prior to receiving such permit applications, DNR qualified under Sec. 402 (§1342) of FWPCA as a discharge permit-granting agency under the superintending jurisdiction of the United States Environmental Protection Agency ("EPA"). Each and every action of DNR in the premises was in accordance with the requirements of FWPCA and was tacitly or actively approved by EPA (Trial Transcript p. 9323).

Following public notice (including, among other things, notice to each of the plaintiffs pursuant to Sec. 402(b)(3) (§1342(B)(3)) of FWPCA and hearing (none of the plaintiffs chose to participate therein), in late 1974 DNR issued discharge permits to the City Commission and the City of Milwaukee under which they have operated, are operating, and at all times material herein, were operating the sewer system and treatment plants serving the Metropolitan Milwaukee Area. (P.Ex. 62-63; D.Ex. 1110).

The permits issued by DNR established specific requirements and parameters for the sewage effluent discharges of the defendant City Commission and the City of Milwaukee. The permits also established timetables for the attainment of such requirements and parameters, provided for monitoring for compliance, and contemplated enforcement of their terms (*Id.*).

The defendant City Commission failed in some respects to fully comply with its permit requirements. Pursuant to the permit enforcement authority specified by Sec. 402(b) (§1342(b)) of FWPCA, the DNR effectuated enforcement proceedings in Dane County Circuit Court, Dane County, Wisconsin, in an action entitled *The Sewerage Commission of the City of Milwaukee and Metropolitan Sewerage Commission of the County of Milwaukee v. State of Wisconsin Department of Natural Resources* (Case No. 152-1342). The permit enforcement action resulted in the entry on May 25, 1977 of a judgment

enforcing the City Commission's discharge permit requirements and providing comprehensive timetables for making the necessary improvements including the correction of wet weather overflows from the combined sewer area (D.Ex. 1311).

Insofar as material here, the discharge permit requirements imposed on petitioners, as implemented by the Dane County Circuit court order, include the following:

1. Secondary treatment of effluents processed in sewage treatment plants operated by the defendants shall be provided.

2. The secondary treatment provided shall cause the effluent discharges from the treatment plants to contain: no more than 30 parts per million (30 PPM) suspended solids (SS) based on a 30 day average, no more than 30 PPM of carbonaceous 5 day biochemical oxygen demand (BOD_5) based on a 30 day average, no more than 1 PPM phosphorus (P) based on a 30 day average, and no more than 200 fecal coliform per 100 milliliters based on a 30 day average.

3. Chlorination at certain times, but no provision as to chlorine residuals.

4. Requirements for elimination of dry weather overflows throughout the system and control of storm induced Combined Sewer Overflows ("CSO") in the combined sewer area. Specific relief provisions related to the availability and provision of state and federal funding are included for these and other permit requirements, with provision for certain deadline extensions so long as $13 million per year for the combined sewer overflow abatement program and $15 million per year for other mandated captial improvements measured in 1976 dollars of local funds are being expended. (P.Ex. 62-63; D.Ex. 1110 and 1311)

The cost-effective character of the "control" required in the permits and the dependancy upon the availability of federal funds reflect the mandate of the federal statute and are absent in the decisions below.

It must be emphasized that the Dane County order calls for control of combined sewer overflows. Since total elimination of combined sewer overflows is technically impossible, *i.e.*, a more severe storm than the level of protection engineered into the system can always occur, the determination of the level of protection is a matter of engineering judgment. The Dane County order will be enforced to guarantee virtual elimination of combined sewer overflows. It is likely that the order can be satisfied by a system designed to prevent overflows at a level of something less than the one-hundred year storm or storm of record. The Dane County order is also "cost sensitive" in that combined sewer overflows were recognized by the parties to be only a portion of the problem faced by Milwaukee and that combined sewer overflows, once several major overflow points were eliminated, would have a lesser priority than other remedial work being undertaken by petitioners. For that reason, the Dane County order was drafted to require continuous progress toward control of combined sewer overflows on a schedule which reflected the fact that federal funds might not be available in certain years in the quantity necessary for optimum progress.

D. Decision of the District Court and the Court of Appeals

During the trial, the State of Illinois failed to call a single witness who had any direct responsibility for public health in that state. The witnesses presented by Illinois had no specific experience with public health in the State of Illinois, the City of Milwaukee or Lake Michigan. They were witnesses who were qualified as "experts," who testified with respect to general scientific principles, and who reached conclusions therefrom with respect to Illinois, Milwaukee and Lake Michigan. While the District Court favorably commented upon the credentials of all of the expert witnesses who testified at the trial, the court

also noted that all of the witnesses were interested in the outcome of the case and none of them were neutral as between the parties or as to the outcome of the case (App. F-4). The determination of liability and remedy imposed upon your petitioners was reached in the face of the following express findings by the District Court:

1. The State of Illinois could have performed studies to determine whether Milwaukee sewage effluents are sufficiently diluted in and by Lake Michigan or inactivated by other means so that only insignificant numbers of pathogens and other pollutants, if any, could reach Illinois waters. Illinois elected not to do so and in so electing chose to produce less evidence than it should have (App. F-10).

2. There are fecal coliform counts on Illinois beaches which fail to demonstrate any pollution coming from Milwaukee (App. F-11).

3. There is no evidence of any outbreak of water-related diseases in Illinois (App. F-12).

4. There is no evidence of any present effect of Milwaukee discharges or, for that matter, of the effect of any other nutrient discharges, on fish life in the lake (App. F-18).

5. There is no evidence that any specific algal problem or any specific taste and odor problem experienced by residents of Illinois or Michigan is attributable to Milwaukee sewage as opposed to the nutrients discharged by any other point or non-point source. (*Id.*)

6. It is impossible to measure accurately any effect on the lake caused by Milwaukee's discharges or to measure accurately the diminution in the

amount of nutrients in the lake if Milwaukee discharges were altogether discontinued (App. F-19).

Based on the record, including the above findings, the Court of Appeals properly reversed the District Court insofar as it imposed an effluent limitation remedy more stringent than required by FWPCA. Inexplicably, the Court of Appeals affirmed the District Court's order to the extent that it required the "elimination" of all sewage overflows.

REASONS FOR GRANTING THE WRIT

I. The Decisions Below Elevate Federal Common Law Above Federal Statutory Law Controlling Interstate Waste Water Discharges; They Will Impose Cost Increases Over The Amounts Required By Congress of Hundreds of Millions of Dollars On The Defendants And Many Billions Of Dollars On The Nation At Large For Eliminating Combined Sewer Overflows; And The Decisions Specified Accelerated Timetables Having Different Fiscal Impacts On Local Governments Than The Political Allocations By Congress.

The decisions below are a judicial foray into the polictical field of resource allocation in environmental management of the nation's interstate water resources requiring expenditures of municipal, state and federal funds of staggering magnitude.

Congress, in order to supplant initial ineffective legislation, and after many hearings and extensive debate, has in the 1972 Act and 1977 Act enacted comprehensive federal statutes establishing an administrative body of federal experts acting by and through qualified state expert administrators to regulate, in cost-effective terms, *all* point source discharges to the nation's waters under an ongoing permit system.

One of the basic characteristics of the Congressional mandate in that legislation is that costs and the availability of federal

funds to localities and states providing interstate water protection are important to pollution control determinations. Nevertheless, costs and the availability of federal funds were not only ignored below, they were expressly declared by the District Court to be of no interest to the decisional rationale.

The decisions below considered federal legislation as a parallel course for protecting the nation's water resources which was of passing, but not controlling, interest to the totally independent approach by the courts under the federal common law, thus failing to accord any weight to the Congressional provision for participation of affected municipalities and states in an expert administrative forum; this while expressing the trier of fact's own lack of expertise in the area. In that setting both the District Court and the Court of Appeals held the "federal common law" to be wholly distinct from, and independent of, the federal statutory scheme for controlling the identical subject matter, namely point source discharges to the nation's waters.

The courts in doing so failed to recognize and deal with the pervasive character of the problem. The issues involved in this case are not merely directed to the resolution of an isolated situation in Milwaukee. They present a problem to this nation as a whole. There are approximately 1,300 communities in the United States, including most of the major cities, which have a total combined sewer area of 2-1/4 million acres, and serve a total of 38 million persons. In fact, 58 major cities such as Chicago, Detroit, New York, Cleveland, Pittsburgh, Philadelphia, San Francisco and Washington, D.C., located in 24 states, have eighty-three percent of the combined sewer area and eighty-one percent of that resident population. EPA, *Report to Congress on Control of Combined Sewer Overflow in the United States,* MCD Rpt. No. 50 (EPA's report pursuant to Sec. 516(c) of FWPCA, Oct. 1, 1978).

With respect to funding combined sewer overflow (CSO) abatement projects, after estimating national costs at $21.16 billion (1978 dollars) for *controlling* combined sewer overflows so as to permit two untreated overflow events per year rather

than totally eliminating them[5], the EPA's October 1, 1978 report to Congress states:

> "It must be remembered that any increase in spending for combined sewer overflow control needs . . . will result in a decrease in spending for all other pollution control needs . . . These trade offs must be weighed carefully for any given municipality." (pp. ES-9-10)

Illustrative of the technical considerations and their impact on costs to the public is a passage from EPA, *Nationwide Evaluation of Combined Sewer Overflows and Urban Storm Water Discharges,* EPA-600/2-77-064a (Sept., 1977):

> "Analysis indicated that control of [overflows from combined sewer at the level of] the one hour, one month storm would permit capture of 90 percent of the precipitation volume. Sizing for the two year, one hour storm yields relatively little incremental control and requires a much higher [cost and] control volume." (p. 3)

A more specific example of the fiscal impact of dealing with combined sewer overflows and one which has direct application to this litigation is provided by a very recent GAO report, *Report by the Comptroller General of the United States: Combined Sewer Flooding and Pollution — a National Problem. The Search for Solutions in Chicago,* CED-79-77 (May 15, 1979). The report considered whether a Tunnel and Reservoir Plan ("TARP") is a cost-effective solution to Chicago's combined sewer overflows. The TARP plan is similar to the "convey, store and treat" solution ordered by the court below to solve the combined sewer overflow problems in the Milwaukee area except, as noted in the report, TARP is not

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[5] *See EPA, 1978 Needs Survey: Cost Methodology for Control of Combined Sewer Overflows and Stormwater Discharge,* EPA Rpt. No. 43019-79-003 (EPA's report to Congress pursuant to Sec. 516(b) of FWPCA, Feb. 10, 1979).

intended to *eliminate* overflows; it is merely meant to *control* them.

According to the GAO, TARP is "one of the largest" public works projects in the nation.

> "[I]ts projected costs will probably exceed the $9.2 billion expended for the Alaskan pipeline." (Vol. 1, p. 1)

* * *

> "Determining the precise cost for TARP and the associated projects is difficult. However, it will be expensive — $4 billion to $8 billion (December 1977 estimates) depending on what estimates are used and which associated projects are included in the total. If history is any indication, costs will continue to escalate and could exceed $11 billion by 1983." (Vol. 1, p.4)

In summary, the GAO report says that when TARP is judged by what it will cost, the taxpayers "must stop and think."

> "In February 1979, EPA estimated that it would take more than $25 billion just to solve the pollution problems of combined sewer communities. If the cost of solving flooding problems associated with combined sewers is included, it could ultimately run more than $100 billion. Thus, the time may have come to reexamine the project." (Vol. 1, pp. 34-37)

It is in this setting, where the technical problems are only beginning to be known, where means to control the problem have monumental fiscal implications, and where major segments of the country and vast numbers of its population are affected, that the courts below have acted. With respect to the evidence relating to Milwaukee's plans to control combined sewer overflow on cost-effective bases consistent with federal

statutory and administrative regulations (P.Ex. 23-30), the District Court said:

> "I read much of the material in the Combined Sewer Overflow study and I find in it no express commitment to the elimination of the overflows. What I find is reference to 'control' of the overflows and 'reduction' of overflows. It is not altogether clear to me that the Combined Sewer study starts with the propostion that the overflows must be eliminated.
>
> I can save a lot of time, and I am going to save a lot of time in the event any further study of that issue is contemplated, because it will be and it is the ruling of this court that all overflows shall be eliminated." (App. F-25)

With respect to costs, the District Court blandly stated:

> "This brings us to the matter of cost, as to which there has been considerable controversy in this case. I think we should break it down into two things, because it is easy to get carried away by the huge numbers that have been bruted about. In my view, the cost of eliminating the overflows, is not really a factor here." (App. F-28)

Thus, the District Court ordered the total elimination of overflows, ordered that the cost of accomplishing this objective was not a factor, and ordered the parties to submit timetables to carry out the remedy so imposed on the defendants. The Court of Appeals affirmed, but with the comment that:

> "[T]he defendants do not provide us with evidence sufficient to justify disagreement with what the court found necessary or evidence sufficient to show that the marginal increase in cost of building a facility of the size required by the district court is significantly greater than the cost of building a facility of the size presumably contemplated by defendants." (App. A-39)

The defendants here are faced with compliance with a costly judgment of the District Court which had determined costs were not a factor; a judgment affirmed by a Court of Appeals on the basis of defendant's failure to provide it with the very same evidence which the District Court gave defendants no opportunity to present! That evidence has now been refined, and shows increased costs of approximately 60% or $300,000,000 in addition to amounts required under the congressional permit system for CSO control.[6]

When one considers that the numbers involved in this case amount to literally hundreds of millions of dollars for these defendants alone and to tens of billions of dollars for the nation as a whole, the conduct of the trial court denying the relevancy of costs which prevented full proof thereof, followed by an appellate decision predicated on a lack of evidence of costs, cannot be permitted to stand as a monumental precedent to the irrelevancy of cost.

The *ad hoc* approach of the courts below will, unless reversed, establish a precedent creating untold harm to the uniform, fiscally responsible approach adopted by Congress in FWPCA and administered by the EPA. In mandating the total elimination of all overflows without respect to cost or the availability of federal funds, the rights of indiviual citizens, municipalities and states throughout the United States are subjected to a precedent having impact upon the entire nation's water resources and having fiscal impacts reaching magnitudes important even to the total federal budget, let alone the budgets of affected municipalities and states.

In enacting FWPCA, Congress recognized that while substantial local and state funds would be required to alleviate

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[6] In accordance with paragraph 8 of the District Court's Judgment Order, Defendants have made extensive engineering studies (including Pilot Plant operations) which have refined these costs (App. D-8). The studies have all been monitored by Illinois engineers at defendants' cost in accordance with paragraph 4 of the Judgment Order (App. D-6).

detrimental discharges to the nation's waters, the potential disastrous fiscal impact on particular municipalities to secure advantages to the nation's waters which would be encountered if the entire cost impact were imposed on local or state governments had to be avoided. Thus, the Congressional enactments clearly contemplate federal funding to municipalities to a very substantial percentage of cost, usually 75%, and further provide for delays in capital expenditures in the event federal funds are not available. In fact, Congress specifically amended FWPCA in 1977 to provide for extensions of time where municipalities' failures to provide the mandated controls were caused by the unavailability of federal funds (Sec. 301(i) (§1311(i) of FWPCA).

It needs no lengthy analysis to demonstrate that with the huge numbers involved in the costs of wastewater treatment, if the requirements imposed on particular municipalities in respect of wastewater treatment are not weighed on fiscal scales which consider local and state financial resources including the availability of federal funds, local fiscal disasters are not only possible but inevitable. Congress clearly recognized this basic consideration.

In contrast, the District Court said:

> "The terms of this order are binding upon the defendants whether or not federal financial assistance becomes available. I hope that federal assistance is made available but if it is not, the program decreed by this order must proceed nonetheless." (App. F-28)
>
> * * *
>
> "But I want to disabuse you right now, Mr. Moerke, and thereby save you some time — that is why I am saying it now. There is no point in your preparing a lot of testimony on alternate theories — if you don't get Federal money, it is going to take you this much longer, and preparing experts to say how much longer — because as I said earlier, on the 29th of July, this

> order will not be contingent upon your getting Federal funding. Milwaukee sewage is not a federal problem." (Transcript of September 9, 1977 hearing before the District Court at p. 42)

Congress has balanced political considerations in providing that federal funding is a significant factor to the timing and implementation of wastewater treatment programs, recognizing that political and fiscal realities are necessarily encountered in dealing with problems connected with the nation's waters. The courts below, on the other hand, explicitly refused to even consider fiscal impacts. After stating its conclusion that cost and the availability of federal funds are irrelevant, the District Court required that the "program decreed by this order must proceed nonetheless....Milwaukee sewage is not a federal problem" (*Id.*) The courts and Congress could not be further apart.

Thus, the decisions below present an important question of federal law which has not been, but should be, settled by this court. Particularly is this true when, in addition to the fiscal and political balances being struck by the federal statutory law, one takes into account the chronology of this Court's early decision giving rise to this case, the decisions below and the sequence of Congressional enactments.

In *Illinois v. Milwaukee, supra,* decided in 1972, this Court said:

> "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance."

At the time of that decision, federal legislation attempted to deal with the subject matter of water resources by specifying water quality criteria for the receiving water. The water quality criteria approach was a total failure from the standpoint of administration and results. However, five months after the complaint was filed herein, Congress acted to preserve the nation's water resources by totally revamping the pertinent federal statutory framework so as to control the discharge of

wastewater. Thus, Congress required each and *every* "point source" of wastewater discharge to be the subject of a permit issued by experts after public hearings with all affected parties — including neighboring states — having the right to be heard and to be protected.

It is equally significant that within two months after the trial court decision, Congress refined its 1972 legislation making explicit statutory pronouncements on the importance of fiscal considerations; requiring *cost-effective* solutions to the determination of water resource protection, and clarifying national goals in the light of those determinations and the existence of federal funding (Sec. 217 (§1297) of FWPCA).

The Supreme Court has recognized that federal legislation on the subject of interstate waters establishes the federal law in place of previously applicable federal common law principles. *Arizona v. California,* 373 U.S. 546 (1963), cited in *Illinois v. Milwaukee, supra* at 106 (App. I-15). The *Arizona* case dealt with the allocation of water in the Colorado River between the various states that border on that river. Congress had passed a statute which provided for a method and formula for allocation of those waters. The State of California argued that the apportionment of the water in the Colorado River should be controlled by the common law doctrine of equitable apportionment which the Supreme Court had applied in earlier cases between various States of the Union. The Supreme Court rejected the State of California's argument, noted that a federal statute was involved, and said:

> "It is true that the Court has used the doctrine of equitable apportionment to decide river controversies between states. But in those cases Congress had not made any statutory apportionment. In this case, we have decided that Congress has provided its own method for allocating among the lower Basin states the mainstream water to which they are entitled under the Compact. *Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an 'equitable*

> *apportionment' for the apportionment chosen by Congress."* (373 U.S. at 565, emphasis added)

It is time for this court to settle the important questions of federal law impacting upon major interstate waters, involving millions of citizens and requiring billions of dollars of local, state and federal funds. To cause the expeditious and efficient expenditure of the billions of federal, state, local and private dollars required to abate water pollution, dischargers must be assured as to what the applicable standards are. Practical and economic reality dictates that dischargers required to expend huge sums of public funds know that the applicable standards are fixed and final. Under the federal statutory scheme, this concern is embodied in Sec. 402(k) (§1342(k)) which establishes that compliance with a permit shall be deemed compliance with the Act. Section 402 (k) (§1342(k)) provides:

> "Compliance with a permit issued pursuant to this section shall be deemed compliance for purposes of sections 309 and 505 [§§1319, 1365], with sections 301, 302, 306, 307, and 403 [§§1311, 1312, 1316 and 1343], except any standard imposed under section 307 for a toxic pollutant to human health. . . ."

In *E. I. duPont de Nemours & Co. v. Train,* 430 U.S. 112, 138 n.28 (1977), this Court said:

> "The purpose of [Sec.] 402(k) [§1342(k)] seems to be to insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict. In short, [Sec.] 402(k) serves the purpose of giving permits finality."

If a discharger remains subject to suit under the "federal common law" as applied by the courts below, and subject to an *ad hoc* determination by the court, without respect to the standards under the federal statutory law, it would ill behoove any municipality or other governmental agency to move forward in an

expenditious manner but would rather place a premium on delay to permit all forums having possible jurisdiction to speak so as to prevent false starts in these monumentally expensive public projects with attendant waste of public funds.

Section 505 (§1365) is the provision of the Act providing for citizen suits. Subsection (e) thereof states:

> "(e) nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or seek any other relief (including relief against the Administrator or a State agency)."

Since compliance with a permit is specifically defined by Sec. 402(k) (§1342(k)) as compliance with Sec. 505 (§1365), and since common law actions are provided for in Sec. 505, it follows that the standards and limitations under Secs. 301, 302, 306, 307, and 403 (§§1311, 1312, 1316, 1317 and 1343) are the maximum discharge limitations to which a discharger may be held under common law or the federal statutory scheme.[7] Thus, the language of the 1972 amendments to the Federal Water Pollution Control Act require the conclusion that the federal common law of interstate water pollution is governed by permit

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[7] Section 301 (§1311) sets forth effluent limitations and/or the authority for the Administrator of the Environmental Protection Agency to define effluent limitations.

Section 302 (§1312) authorizes the Administrator to establish stricter limitations than are found in Sec. 301.

Section 306 (§1316) contains the authorization for the Administrator to set national standards of performance.

Section 307 (§1317) authorizes the Administrator to establish toxic and pretreatment effluent standards.

Section 403 (§1343) concerns ocean discharge criteria.

limitations in those instances in which the harm complained of is the subject of a permit issued pursuant to the Act.

The decision of the Seventh Circuit Court below is directly contrary to the Federal Statute on the matter.

The impact of Sec. 402 (§1342) was brought to the attention of the Seventh Circuit below and extensively briefed by the defendant Commissions and City of Milwaukee. The court below summarily rejected the statutory governance of federal common law without discussion of the issue in its decision.

Once Congress acted to provide the uniform rules and meaningful remedies, the manner in which the basic interests of the nation would be attained were set out and defined. The federal common law, to the extent it continued in the area, should be limited to carrying out the Congressional mandate. With the definitive legislative action of Congress, the sole branch of government in which all states are represented, the federal common law does not remain subject to "no fixed rules" and the "informed judgment of the chancellor," *Illinois v. Milwaukee, supra* at 107-108 (App. I-16 and 17); "catch as catch can" rules as might be established in case-by-case judicial determinations made by federal district, appellate and supreme court judges are no longer in vogue. The basic interests of federalism demand that independent judicial aproaches to a "federal common law" must give way. The rationale for this conclusion is aptly stated in Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy,* 86 Yale L.J. 1196, 1228-1230 (1977) as follows:

> "Congressional control of interstate spillovers is supported by a final consideration: the inherent power of Congress to take measures reasonably necessary for preserving the system of union. Spillovers have and will continue to create tensions among the states. As economic development proceeds and populations grow, interstate pollution will increase, and with it the potential for retaliatory tactics and litigation.

Congressional power to mitigate these tensions through preventive legislation is implicit in the very decision to replace a loose confederation hamstrung by interstate friction with a strong national government.

* * *

Because of political and administrative constraints, Congress must often deal with spillover problems in a generic fashion. A case-by-case judicial determination of whether federal statutory impositions on states were warranted in particular instances would, in effect, make the judge-made common law of interstate pollution superior to congressional statute."

In Zener, *The Federal Law of Water Pollution Control,* in *Federal Environmental Law* (E. Dolgin and T. Guilbert, ed. 1974) at 790 the former General Counsel of the Environmental Protection Agency says the following:

"Finally, whatever limited importance the federal common law might have as a tool for the regulation of water pollution will tend to recede as the FWPCA Amendments of 1972 are implemented and detailed, numerical standards are established for the major categories of waste dischargers. In *Illinois v. Milwaukee,* the Court stated that '[w]hile the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning such rules of decision.' This formulation was obviously intended to give the Court some leeway in deciding whether to follow the rules contained in the FWPCA. However, since the decision, the 1972 Amendments have established a much more comprehensive regulatory scheme than had previously existed. If, under that scheme a discharger is governed by an administratively established effluent limitation embodied in a federal permit, it seems doubtful that a

> federal court would intervene under the auspices of federal common law to impose a different standard on the discharger."

Similarly, Professor Grad in *Treatise on Environmental Law* (Matthew Bender, 1977), which followed the passage of the 1972 amendments to the FWPCA, says the following regarding federal common law in light of that statute:

> "The law of nuisance has been far from clear in its application to modern water pollution and air pollution situations. It is in response to the inadequacies and lack of standards of the law of nuisance that much environmental regulatory legislation has been developed. The development of a Federal common law of nuisance seems both unnecessary and unwarranted in the light of recent Federal standards and Federal enforcement sanctions provided under appropriate legislation."

This same rationale was expressed by the Court of Appeals for the Fourth Circuit in *Committee for the Consideration of the Jones Falls Sewage System v. Train,* 539 F.2d 1006 (4th Cir. 1976). That court said:

> "To the extent there is a federal interest, it is expressed in the Federal Water Pollution Control Act Amendments of 1972, but the plaintiffs have no claim based upon the statute.
>
> *Indeed, it would be an anomaly to hold that there was a body of federal common law which proscribes conduct which the 1972 Act of Congress legitimates.* The defendants are in compliance with the statute. They are operating under a permit issued in accordance with the statute and the authorization of the Environmental Protection Agency. The Congress and the Executive Department, acting through the Environmental Protection Agency, have declared their conduct lawful until the time for the application

> of more restrictive standards. While the state courts are free to apply state nuisance law more rigidly, a federal court in such a local controversy may not turn to a supposed body of federal common law to impose stricter standards than the statute provides." (539 F.2d at 1009, emphasis added)

It is in this light — the acknowledged enactment of comprehensive legislation in the field — that this court must decide the issue left for subsequent resolution in its 1972 *Illinois v. Milwaukee* decision. This Court and this Court alone is in position to bring national order out of the seeds of chaos sown by the decisions below.

II. The Decisions Below Ignored Previous Decisions Of This Court Which Are Controlling Precedent And Which Establish That In The Absence Of Demonstrative Or Empirical Evidence Of Any Nuisance, The Conflicting Testimony Of Expert Witnesses Is Not Sufficient To Accord Relief In An Action Alleging An Interstate Nuisance.

A. The Record Is Devoid Of Any Demonstrative Or Empirical Evidence Of Nuisance In Illinois Or Michigan Waters. The Courts Below Could Rely Only On the Speculations Of Experts Which Were Contradicted By Historical Fact.

A fundamental, basic and controlling fact of this case is that no witness and no exhibit in the entire record found any virus, or other pathogen from any source in any Illinois or Michigan waters. Instead, the evidence presented by the plaintiffs consists of some fecal coliform counts and the conclusions and opinions of experts all of whom, as the District Court noted, were interested in the outcome of the case and none of whom were neutral as between the parties or as to the outcome of the case (App. F-4). Specifically, the District Court made the following findings *after first acknowledging* that the expert testimony was sometimes over the head of the court, that the court's grasp of some of the testimony was less complete than

the court would have liked it to be, and that it would have taken the enrollment of the court in a university course directed at a reorientation of its entire education to remedy this deficiency (App. F-3 and 4):

1. If the position of the State of Illinois is correct, a properly conducted study should have resulted in some circumstantial evidence that would tend to confirm Illinois' theory. The State of Illinois could have performed studies to determine whether Milwaukee sewage effluents are not sufficiently diluted in and by Lake Michigan so that only insignificant numbers of pathogens and other pollutants, if any, could reach Illinois waters. Illinois elected not to do so because it was afraid of a negative result and in so electing chose to produce less evidence than it should have. (App. F-10)

2. There are fecal coliform counts on Illinois beaches which fail to demonstrate any pollution coming from Milwaukee. (App. F-11)

3. There is no evidence of any outbreak of water-related diseases in Illinois. (App. F-12)

4. There is no evidence of any present effect of Milwaukee discharges or, for that matter, of the effect of any other nutrient discharges, on fish life in the lake. (App. F-18)

5. There is no evidence that any specific algal problem or any specific taste and odor problem experienced by residents of Illinois or Michigan is attributable to Milwaukee sewage as opposed to the nutrients discharged by any other point or non-point source. (*Id.*)

6. It is impossible to measure accurately any effect on the lake caused by Milwaukee's discharges or to measure

> accurately the diminution in the amount of nutrients in the lake if Milwaukee discharges were altogether discontinued. (App. F-19)

Thus, the undisputed fact is that over the many years spanning the more than a century that Milwaukee has been in existence, there has been no showing of any disease or any other adverse affect resulting in Illinois or Michigan waters from sewage discharges in Wisconsin, indeed, no outbreak of disease has been shown to have occurred in Milwaukee itself though the drinking water intakes of Milwaukee are close to the points of discharge while those of Illinois and Michigan are, to say the least, remote. Note that the concern expressed by the courts below related to enteroviral diseases; diseases which manifest themselves in a matter of weeks after exposure (Trial Transcript pp. 2139, 2198). Certainly if there were any merit to the speculated hazard, there would be *some* evidence of its existence, some evidence that it actually caused *something* in the lengthy span of time during which the supposed hazard existed. There is nothing!

This Court's 1972 decision in *Illinois v. Milwaukee* relied upon previous decisions of this Court as having established a "federal common law" relating to interstate nuisance controversies. These cases are *Missouri v. Illinois,* 180 U.S. 208, 200 U.S. 496 (1901, 1906), *New York v. New Jersey,* 256 U.S. 296 (1921) and *North Dakota v. Minnesota,* 263 U.S. 365 (1923).

The status of the evidence in this case as summarized in the findings of the District Court set out above is strikingly similar to the evidence before this Court in *Missouri v. Illinois, supra.* This Court rendered two decisions in the *Missouri v. Illinois* case. The first decision, reported at 180 U.S. 208, dealt with procedural matters at the demurrer stage of the proceedings.

When the *Missouri* case came before the Supreme Court on the merits, Justice Holmes had this to say about the earlier decision (the only one cited by the District Court in this case):

"The decision upon the demurrer discussed mainly the jurisdiction of the court, and, as leave to answer was given when the demurrer was overruled, naturally there was no very precise consideration of the principles of law to be applied if the plaintiff should prove its case. That was left to the future, with the general intimation that the nuisance must be made out upon determinate and satisfactory evidence, that it must not be doubtful, and that the danger must be shown to be real and immediate.

* * *

But the evidence now is in, the actual facts have required for their establishment the most ingenious experiments, and for their interpretation the most subtle speculations, of modern science, and therefore it becomes necessary at the present stage to consider somewhat more nicely than heretofore how the evidence in it is to be approached." (200 U.S. at 517-518)

Justice Holmes proceeded to emphasize two major legal principles: (i) Congress has the power to enact the paramount law, and (ii) the courts should not take the place of the legislature.

"In the case at bar, whether Congress could act or not, there is no suggestion that it has forbidden the action of Illinois. The only ground on which that state's conduct can be called in question is one which must be implied from the words of the Constitution. The Constitution extends the judicial power of the United States to controversies between two or more states, and between a state and citizens of another state, and gives this court original jurisdiction in cases in which a state shall be a party. Therefore, if one state raises a controversy with another, this court must determine whether there is any principle of law, and, if any, what, on which the plaintiff can recover.

> *But the fact that this court must decide does not mean, of course, that it takes the place of a legislature.* . . . If we suppose a case which did not fall within the power of Congress to regulate, the result of a declaration of rights by this court would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the States, sanctioned by the legislature of the United States.
>
> * * *
>
> The difficulties in the way of establishing such a system of law might not be insuperable, but they would be great and new." (200 U.S. at 518-520, emphasis added)

The Supreme Court then stated that these legal principles affect the manner in which a court must view the evidence.

> "It is decided that a case as is made by the bill may be a ground for relief. The purpose of the foregoing observations is not to lay a foundation for departing from that decision, *but simply to illustrate the great and serious caution with which it is necessary to approach the question whether a case is proved."* (200 U.S. at 520, emphasis added)

The Supreme Court then turned to the evidence. It is strikingly similar to — though much stronger than — the evidence before the courts below:

> *"The plaintiff's case depends upon an inference of the unseen.* It draws the inference from two propositions. First, that typhoid fever has increased considerably since the change, and that other explanations have been disproved; [No enteroviral outbreaks were shown in the *Milwaukee* case now before the Court] and second, that the bacillus of typhoid can

and does survive the journey and reach the intake of St. Louis in the Mississippi.

We assume the now-prevailing scientific explanation of typhoid fever to be correct. But when we go beyond that assumption, everything is involved in doubt. The data upon which an increase in the deaths from typhoid fever in St. Louis is alleged are disputed. The elimination of other causes is denied. The experts differ as to the time and distance within which a stream would purify itself. No case of an epidemic caused by infection at so remote a source is brought forward and the cases which are produced are controverted.

The Chicago drainage canal was opened on January 17, 1900. The deaths from typhoid fever in St. Louis, before and after that date, are stated somewhat differently in different places. . . . we assume that the increase is real. Nevertheless, comparing the last four years with the earlier ones, it is obvious that the ground for a specific inference is very narrow, if we stopped at this point. The plaintiff argues that the increase must be due to Chicago, since there is nothing corresponding to it in the watersheds of the Missouri or Mississippi. On the other hand, the defendant points out that there has been no such enhanced rate of typhoid on the banks of the Illinois as would have been found if the opening of the drainage canal were the true cause.

* * *

Both sides agree that the detection of the typhoid bacillus in the water is not to be expected [In the *Milwaukee* case, the trial court found that plaintiff had chosen not to perform available detection studies, thus producing less evidence than it should have because fearful of the result!]. But the plaintiff relies upon proof that such bacilli are discharged into

the Chicago sewage in considerable quantities; that the number of bacilli in the water of the Illinois is much increased, including the *bacillus coli communis,* which is admitted to be an index of contamination, and that the chemical analyses lead to the same inference.

* * *

On the other hand, the defendant's evidence shows a reduction in the chemical and bacterial accompaniments of pollution in a given quantity of water, which would be natural in view of the mixture of nine parts to one from Lake Michigan. It affirms that the Illinois is better or no worse at its mouth than it was before, and makes it at least uncertain how much of the present pollution is due to Chicago and how much to sources further down, not complained of in the bill. It contends that if any bacilli should get through, they would be scattered and enfeebled and would do no harm." (200 U.S. at 517-527, emphasis added)

While the evidence before the Court in *Missouri v. Illinois* was strikingly similar to and considerably stronger than that present here (in the absence of tests that could and should have been performed by plaintiff), the result reached by the Supreme Court is the opposite of that reached by the courts below — the Supreme Court dismissed the case!

Similarly, the Supreme Court in *New York v. New Jersey, supra,* met the same evidentiary problem and held that in such a situation history prevails over the speculation of experts.

"[T]he evidence of the complaint is that, as early as 1906, the water adjacent to New York City . . . was much polluted by sewage, but that the water in other parts of the bay, especially near Robbins reef light, was somewhat, but not greatly, contaminated. . . . And the evidence taken under the order of the court

in 1919 shows an irreconcilable conflict in the testimony as to the then condition of the water, especially near Robbins reef light. [I]t is undisputed that . . . New York sewage, untreated, was discharged from over 450 sewers directly into the adjacent waters . . . .

* * *

It would seem, therefore, that if the anticipations of the experts for the complainants, as to the results likely to be produced by the effluent from the sewer of defendants, were well founded, by the year 1919 [in the case of Milwaukee, 1972] conditions in the harbor should have become so pronounced and plain [in the case of Milwaukee the epidemics of enteroviral disease would have been so rampant] that there could not have been such conflict as the record shows in the testimony of trustworthy and competent scientists as to its then existing condition.

* * *

[W]e must conclude that the complainants have failed to show by the convincing evidence which the law requires that the sewage which the defendants intend to discharge into Upper New York Bay . . . would so corrupt the water of the Bay as to create a public nuisance . . . ." (256 U.S. at 311-314)

Contrary to the action of the courts here which found liability and imposed severe and costly remedies on the defendants, the Supreme Court there, in extremely similar fact circumstances, dismissed the action. That same result is compelled here where there is *no* demonstrative evidence of *any* effect from more than a hundred years of Milwaukee's discharges to Lake Michigan.

This is particularly true in light of the fact that Milwaukee's discharges to Lake Michigan have been and continue to be the subject of a statutory scheme administered by an independent federal agency interested only in the public health and public navigable waters, and which agency is unbiased as between contesting parties.

Of more than passing interest is the fact that Illinois and Michigan chose not to participate in the administrative proceedings relating to Milwaukee's permits although under the federal statute they had notice and a full opportunity to do so. FWPCA §302(a) (§1312); §509(b) (§1369); §402(b)(5), (§1342(b)(5)); Wis. Stat. §147.20 (1977). Those states and states relying on this case for precedent should not be permitted to take weak cases to non-expert federal court forums for a trial on expert opinion to avoid the application of independent, neutral expertise under the congressionally enacted permit system.

An analysis of the proceedings below that involves no record dispute leads to reversal. The analysis starts with the legal truism that in order for plaintiffs to prevail they must have introduced some evidence with respect to the actual state of Lake Michigan water within the jurisdiction of each of the plaintiffs. Lake Michigan is out there; its waters are available for scientific analysis. Testing procedures to prove the existence of the dangers speculated upon by the witnesses are known and available. Yet plaintiffs chose to do no such testing — a choice which the District Court characterized as having been made out of fear over the results (App. F-10). Are there viruses in Illinois' waters? Are there pathogenic bacteria in Illinois' waters? The best that can be said for the record before this Court is that no one really knows and that the plaintiffs did not prove what was there and did not want to find out for sure.

The plaintiffs should have been required to come forward with some empirical evidence relating to public health and actual conditions in the lake. This was the type of evidence required by the Supreme Court when it had occasion to deal with similar issues. Before a court imposes liability for untold millions of dollars of expense should it not know what the real

danger is? Should it not at least require that an attempt be made to determine the existence of these alleged dangers?

Speculations by the courts below as to remotely possible coincidental results that might be inferred from the outer reaches of some of the hypotheses of experts cannot withstand against known and observable facts before the court. Here such physical tests as were taken in Lake Michigan were taken by defendants and they negate the existence of pathogens in Illinois waters; even more importantly, the fact that there has been no outbreak of any water-borne infections or diseases in Illinois certainly negates any claim that a hazard exists or has existed in the last hundred years that Milwaukee has been discharging effluent to Lake Michigan 25 miles away from Illinois.

Where a party claims that a hazard exists requiring injunctional intervention at hundreds of millions of dollars in cost, and where that alleged hazard has existed for a hundred years, the language and logic of the Supreme Court in *North Dakota v. Minnesota, supra,* should put an end to the controversy:

> "It is difficult for a court to decide issues of fact upon which experts equal in number and standing differ flatly, and when their conclusions rest on estimates upon the correctness of which the court, without technical knowledge, cannot undertake to pass. In such cases, the court looks about for outstanding facts from which the lay mind can safely draw inferences as to the probabilities.
>
> * * *
>
> To attribute to such a minor but constant artificial incident a phenomenal effect for two whole summer seasons without a recurrence since is to fly in the face of all reasonable probability. The evidence must be clear and convincing indeed to support such a theory. Instead of that, it is a combination of estimates and conjecture based on no accurate knowledge of the flow of the Mustinka before the

ditches were put in, and depending greatly on a hypothetical detaining basin in the so-called Delta zone, existence of which the greater weight of the evidence negates.

* * *

The conclusion we have come to on the main issue of fact — that Minnesota is not responsible for the floods of which complaint is made — makes it unnecessary for us to consider this evidence as to a practical remedy for them, and requires us to leave the opinions and suggestions of the expert engineers for the consideration of the two states in a possible effort by either or both to remedy existing conditions in this basin." (263 U.S. at 385-388)

While thousands of pages of transcipt and hundreds of exhibits have been adduced, a review of the record as a whole does not actually establish a right to relief such as to cause a court to reach the necessity of deciding the effect of the Federal statutes and the underlying administrative action upon the federal common law nuisance the plaintiffs' attempt to establish.

This Court has repeatedly held that speculations based on hypotheses of experts do not rise above demonstrated and demonstrable facts. Here the facts are clear. No pathogens have been shown in Illinois waters. No effects of pathogens have been shown in Illinois. No accelerated eutrophication resulting from defendants' discharges has been shown in either Illinois or Michigan territorial waters. All we have is some expert hypotheses versus other expert hypotheses followed by a never-ending and inconclusive chain of speculation.

B. Neither Illinois Nor Michigan Require The Level Of Control Of Overflows Ordered By The Courts Below.

If the hazards Illinois and Michigan allege are presented by overflows from the Milwaukee sewage system were truly a con-

cern of those plaintiffs, rather than being a strawman for this litigation, one would assume that a requirement to completely eliminate all overflows would be imposed by both Illinois and Michigan on their own municipal sewage discharges in order to protect their own citizens. In truth and in fact, neither Illinois nor Michigan require the total elimination of all overflows as ordered by the courts below.

In *Missouri v. Illinois, supra,* 200 U.S. at 522, this court stated:

> "Where, as here, the plaintiff has sovereign powers, and deliberately permits discharges similar to those of which it complains, it not only offers a standard to which the defendant has the right to appeal, but as some of those discharges are [at points where they could cause the injury complained of], it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it that courts should not be curious to apportion the blame."

Illinois does not prohibit combined sewer overflows nor require their complete elimination. Illinois Pollution Control Board Rules and Regulations, Chapter 3: Water Pollution, §602 (1976) (P.Ex. 171). The State of Illinois, through its Environmental Protection Agency, has permitted the City of Waukegan, which is served in part by combined sewers, to build a treatment plant which will allow bypasses of sewage into Lake Michigan from what is defined as a one-year storm (Trial Transcript pp. 13444-45, 13450).

Illinois permits the City of Chicago to discharge large volumes of untreated sewage into Lake Michigan by means of reversals or backflows of the Chicago Canal System. Such backflows into Lake Michigan of hundreds of millions of gallons of polluted river water containing untreated sewage have occurred 19 times from 1959 through 1978, with 12 of those in the last 10 years (Trial Transcript pps. 4026-4034; D.Ex. 170 p. 9; GAO Report CED-79-77, supra, Vol. 1 p. 18).

In the City of Chicago, where combined sewers service one of the largest areas and population in the United States, the planned TARP project, even if finally completed at a cost estimated to be between $4 billion and $11 billion, *will not eliminate overflows.*

With respect to the State of Michigan, On September 9, 1977, that State entered into a consent judgment in Civil Action No. 77-1100, in the United States District Court for the Eastern District of Michigan, wherein the United States of America was the plaintiff and the State of Michigan and the City of Detroit were defendants. That consent judgment does not require the "elimination" of combined sewer overflows, it rather mandates a program for the attainment of "control" of overflows from the combined sewer system in a cost effective manner (*United States v. State of Michigan et al,* E.D. Mich. No. 77-1000, Sept. 9, 1977, judgment p. 29).

The difference in cost between a system which has the capacity to totally eliminate overflows as distinguished from an environmentally sound cost effective system to control overflows is hundreds of millions of dollars in Milwaukee alone. Its precedential effect on the nation would be fiscally disasterous. The imposition of such a burden on Milwaukee at the behest of sovereign states which do not impose similar burdens on their own citizens cannot be justified by reliance upon federal common law.

III. This Action Should Have Been Dismissed On The Ground: (1) That The Court Had No Jurisdiction Over The Person Of The Defendants, Or (2) That The Venue In The Action Was Improperly Laid In The District Court For The Northern District Of Illinois, Or Upon Both Such Grounds.

This action was commenced in the United States District Court for the Northern District of Illinois by the filing of a complaint alleging three causes of action, the first based upon the federal common law of nuisance, and the second and third based upon state statutory and common law, the first being held

by the Court of Appeals to be controlling so as to preclude the latter two from being addressed (App. A-46 n.53). The complaint was served upon the defendants pursuant to the Illinois "long-arm" statute, Ill. Rev. Stat. ch. 110, §17 (1972) (see "Statutory Provisions Involved", *supra*).

Subsequent to the service of the complaint, the defendants moved to dismiss the action on the ground that the court lacked jurisdiction over the person of the defendants and that venue of the action did not properly lie in the Northern District of Illinois. The trial court (Judge Bauer presiding) denied these motions. *Illinois v. Milwaukee,* 4 E.R.C. 1849, 1850 (N.D. Ill. 1972) (App. H-4).

The facts in this case clearly establish that none of the defendants have acted in any way which would justify the conclusion that they had either committed "a tortious act *within*" the State of Illinois (the statutory requirement to come under the Illinois long-arm statute) or that they have the requisite "minimal contacts" with the State of Illinois that are a constitutional prerequisite to the exercise of power over them by the State of Illinois. This is not a products liability case where it is arguable that the act of a manufacturer in shipping a product into a state is that type of act by which the manufacturer purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws. *Cf., International Shoe Co. v. Washington,* 326 U.S. 310 (1945); *Hanson v. Denckla,* 357 U.S. 235 (1958). Here the defendants do nothing in the State of Illinois. They take no act to purposely avail themselves of the privilege of conducting activities within the State of Illinois; they invoke no benefits or protection from the laws of the State of Illinois. The courts below brushed aside the difficult statutory and constitutional issues presented by the facts of this case and defendants' motion to dismiss by summarily rejecting the motion.

The treatment of the venue issue below was equally summary. The courts relied upon 28 U.S.C. §1391(b), which states:

> "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

Specifically, the courts below relied upon the words "or in which the claim arose" and opined that the claim of the State of Illinois arose in the Northern District of Illinois "where the injury was suffered." This was error. The courts below are bound by relevant federal authority. *See, Cole v. Trustees of Columbia University,* 300 F. Supp. 1026, 1029 (S.D. N.Y. 1969) and Sec. 505(c)(1) of FWPCA (§1319(c)(1)), which statute provides as follows:

> "Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located."

Though the defendants pointed out that as a matter of law, the claims made against them in the complaint were inherently "local" in nature, the District Court concluded that the claims were "transitory" (App. H-3). The Court of Appeals held that this distinction was not significant (App. A-5 and 6). In reaching these conclusions the courts disregarded the decisions of this Court which held that nuisance actions are "local" (their locus is their source) and not "transitory" (their locus does not follow to any place of asserted damage). *Ladew v. Tennessee Copper Co.,* 218 U.S. 357 (1910); *Mississippi and M.R. Co. v. Ward,* 2 Black. 485 (1863), and disregarded the long established principle that actions against municipal corporations are themselves inherently local in nature, so much so that absent specific statutory provision to the contrary, they cannot be brought outside the judicial district where the municipal corporation is situated. *See,* Annot., 93 A.L.R. 500 (1934); *Parks Co. v. City of Decatur, Ill.,* 138 F. 550 (6th Cir. 1905); *Markham v. City of Newport News, Va.,* 184 F. Supp. 659 (E.D. Va. 1960).

Now this Court has clarified the meaning of §1391(b) in *Leroy v. Great Western United Corp.*, ____ U.S. ____, 47 U.S.L.W. 4844 (June 26, 1979). As clarified, venue was improperly laid in the Northern District of Illinois requiring reversal and a direction to dismiss. In this Court's language:

> "In our view, therefore, the broadest interpretation of the language of §1391(b) that is even arguably acceptable is that in the unusual case in which it is not clear that the claim arose in only one specific district, [footnote omitted] a plaintiff may choose between those two (or conceivably even more) districts that with approximately equal plausibility — in terms of the availability of witnesses, the accessibility of other relevant evidence, and the convenience of the defendant (but *not* of the plaintiff) — may be assigned as the locus of the claim." (47 U.S.L.W. at 4847, emphasis in original)

In this case *all* of the conduct complained of occurred in the defendants' district; very few of the witnesses (including plaintiffs' witnesses) resided in the district of trial; many of defendants' witnesses resided in defendants' district and *all* defendants reside in the Eastern District of Wisconsin, not in the district of trial.

In the absence of personal jurisdiction and appropriate venue, this action should be dismissed.

CONCLUSION

No more important federal question could be presented than one which includes:

1. The relationship between federal statutory law and federal common law;

2. The governance of conduct in two or more states affecting the nation's water resources;

3. Fiscal responsibility of a degree presenting possible bankruptcy to communities and funding hardships to the nation as a whole;

4. The determination of whether all of the issues must be uniformly determined for all of the nation's waters or be subject to *ad hoc*, parochial departures from even-handed approaches; and

5. The determination of the issue of *in personam* jurisdiction over, and the proper venue for actions dealing with, point source discharges by municipalities.

All are present here. Each would on its own strongly suggest the grant of the Writ sought. Together, they emphatically require it.

Respectfully submitted,

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September 11, 1979

Supreme Court, U.S.
FILED
SEP 11 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE

Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

Appendices to the Petition for a Writ of Certiorari To the United States Court of Appeals For the Seventh Circuit

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Appendices to Petition for Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

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In the

United States Court of Appeals

For the Seventh Circuit

No. 77-2246

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

and

PEOPLE OF THE STATE OF MICHIGAN,

Intervening Plaintiff-Appellee,

v.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Defendant-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 72-C-1253—**John F. Grady**, *Judge.*

ARGUED MAY 24, 1978—SUBMITTED AFTER SUPPLEMENTAL BRIEFING OCTOBER 12, 1978—DECIDED APRIL 26, 1979

Before FAIRCHILD, *Chief Judge,* TONE, *Circuit Judge,* and HARPER, *Senior District Judge.**

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* The Honorable Roy W. Harper, Senior District Judge of the United States District Court for the Eastern and Western Districts of Missouri, is sitting by designation.

TONE, *Circuit Judge.* The State of Illinois filed this action under the federal common law of nuisance to enjoin the City of Milwaukee and the Sewerage Commissions of the City and County of Milwaukee[1] from discharging raw sewage and inadequately treated sewage into Lake Michigan.[2] Illinois alleged and undertook to prove at trial that the sewage contains pathogens, disease-causing viruses and bacteria, which are transported by currents into parts of the lake that lie within Illinois, where they present a substantial threat to the health of Illinois residents, and also that the sewage contains nutrients that accelerate eutrophication of the lake. The State of Michigan intervened as a plaintiff on the eutrophication issue only. After a four month trial, the district court found that plaintiffs had proved their allegations and entered a judgment requiring defendants to cease discharging raw sewage and to treat sewage before discharging it in compliance with effluent limitations more stringent than the minimum limitations imposed pursuant to the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.* Defendants appeal, raising the issues of (1) whether the relief available in an action

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[1] For practical purposes, the two commissions may be regarded as one. *See also* n. 33, *infra.* The chief administrative officer for both is the same man; he also serves as the secretary for both commissions. The county commission has no employees other than the chief administrative officer and secretary referred to and uses the staff of the city commission when necessary. [Tr. 110-113.] In this opinion we differentiate between the two only when the difference is significant. [Record references in brackets are included in the slip opinion for the convenience of judges, counsel, and others who have access to the record but will be omitted from the opinion as it will appear in the Federal Second Reporter.]

[2] Illinois also named three other Wisconsin cities as defendants in this case: Kenosha, Racine, and South Milwaukee. They are not involved in this appeal.

After judgment was entered the County of Milwaukee moved to intervene as an indispensable party under Rule 19(b), Federal Rules of Civil Procedure (Fed. R. Civ. P.). The motion was denied; this court affirmed, without written opinion. The Supreme Court denied certiorari. 47 U.S.L.W. 3583 (1979).

based on the federal common law of nuisance is greater than that available under the federal statute, and (2) whether the evidence in this case is sufficient to support the relief granted. As to the first question, we hold that the statute does not limit the relief that may be granted; as to the second, we hold that the evidence is sufficient to support only some of the relief granted and therefore affirm in part and reverse in part.

This litigation began with Illinois' petition for leave to file an original action in the Supreme Court of the United States, which was denied, *Illinois v. Milwaukee*, 406 U.S. 91 (1972). Illinois then filed suit in the United States District Court for the Northern District of Illinois. Defendants' motions to dismiss for lack of *in personam* jurisdiction and improper venue were denied, *Illinois v. Milwaukee*, 4 E.R.C. 1849 (N.D. Ill. 1972); later, defendants' motions to dismiss for failure to state a claim on which relief could be granted were also denied, *Illinois v. Milwaukee*, 366 F.Supp. 298 (N.D. Ill. 1973).

In due course the case proceeded to trial, at the conclusion of which the judge orally and extemporaneously announced his findings of fact and conclusions of law. The facts and the relief granted will be described later, as they become pertinent to the issues discussed.

Defendant-appellants' position is supported by the briefs of three *amici curiae:* the State of Wisconsin, the National League of Cities, and the United States Conference of Mayors. In addition, the United States has filed a brief *amicus curiae* in which it takes no position on the merits but supports the arguments of Illinois and Michigan that the federal common law of nuisance is not preempted or limited by federal legislation.

After oral argument this court ordered supplemental briefing addressed to (1) the elements required to be proved to establish a claim for a common law nuisance, (2) identification of particularized findings of the district court considered material to those elements and record references to the evidence supporting those findings, and (3) identification of evidence in the record

supporting the reasonableness and necessity of the relief granted by the trial court. The parties filed extensive supplemental briefs, and each side subsequently filed a reply to the other's supplemental brief, as a consequence of which submission of the case was delayed until October 1978.

I.

Objections to the Forum

Defendants raise three arguments that may be broadly characterized as objections to the forum. First, defendants contend that they have committed no "tortious act within" the State of Illinois as that phrase is used in the Illinois "long-arm" statute, § 17 of the Illinois Civil Practice Act, Ill. Rev. Stat. ch. 110, § 17 (1977), and therefore service of process was ineffective and the United States District Court sitting in Illinois could not exercise personal jurisdiction over them. *See* Rule 4(e), Federal Rules of Civil Procedure (Fed. R. Civ. P.). Second, defendants contend that their contacts with Illinois are insufficient to meet the minimum required by *International Shoe v. Washington*, 326 U.S. 310 (1945). Third, defendants contend that even if the court had personal jurisdiction, venue was improper. Judge Bauer, then a district judge, rejected these contentions in denying defendants pretrial motions to dismiss in *Illinois v. Milwaukee*, *supra*, 4 E.R.C. at 1850, and we do likewise.

For purposes of § 17 "a tort is committed in the place where the injury occurs." *McBreen v. Beech Aircraft Corp.*, 543 F.2d 26, 28 (7th Cir. 1976). It seems beyond dispute that injury to the plaintiff in this case occurred in Illinois. *Cf. Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971).

As to the second contention, the critical issue is whether it is fair and reasonable to require the defendants to defend in Illinois. *See Kulko v. Superior Court of California*, 436 U.S. 84, 92 (1978); *Telco Leasing, Inc. v. Marshall County Hospital*, 586 F.2d 49 (7th Cir.

1978).[3] Each year defendants dump into Lake Michigan millions of gallons of pathogen-containing sewage, which the district court found is sometimes carried into Illinois waters and presents a substantial threat of harm to Illinois residents. Under such circumstances, we do not think it unfair or unreasonable to require the defendants to defend their conduct in a federal forum located within the State of Illinois. *See Ohio v. Wyandotte Chemicals Corp., supra,* 401 U.S. at 500.

Defendants argue that venue was improper for three different reasons: (1) the venue provision of the Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, 86 Stat. 816, requires that the suit be filed in the district where the source is located, (2) all "nuisance" actions are "local" and therefore must be filed in the district where the source is located, and (3) all actions against a municipal corporation are "local" and therefore must be filed in the district where the municipal corporation is located. The first argument is quickly disposed of, for the venue provision of the statute is by its terms inapplicable. That provision is relevant only to "action[s] respecting a violation . . . of an effluent standard or limitation . . . brought under [§ 505] . . . ." § 505(c)(1). Here, plaintiff's action is based on the federal common law of nuisance. Therefore the relevant venue provision is 28 U.S.C. § 1391(b), which permits suit in either the "judicial district where all defendants reside, or in which the claim arose . . . ." *Illinois v. Milwaukee, supra,* 406 U.S. at 108 n.10.

Whatever may be the significance of state law in determining whether an action is "transitory" or "local" in

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[3] If Congress had chosen to authorize nationwide sevice of process, no minimum contacts issue would be raised. *See, e.g., Fitzsimmons v. Barton,* 589 F.2d 330, 333 (7th Cir. 1979); *Mariash v. Morill,* 496 F.2d 1138, 1143 & n. 6 (2d Cir. 1974). Congress has not done so and Fed. R. Civ. P. 4(e) makes jurisdiction dependent on the long-arm statute or rule of court of the state in which the district court is held; therefore we are required to determine whether defendants' contacts with Illinois are sufficient to support the exercise of *in personam* jurisdiction.

other contexts,[4] we agree with the district court, *Illinois v. Milwaukee, supra*, 4 E.R.C. at 1850, that the language in the Supreme Court's opinion in *Illinois v. Milwaukee, supra*, 406 U.S. at 108 n.10, indicates that an action against a municipal corporation and based on the federal common law of nuisance may be filed, pursuant to 28 U.S.C. § 1391(b), in either the district where all the defendants reside or the district where the claim arose, without regard to any otherwise applicable state venue statutes or common law rules. In this case, the claim arose in the Northern District of Illinois, where the injury was suffered, and therefore venue was proper.[5]

II.

Effect of Federal Statutes on Federal Common Law of Nuisance

In *Illinois v. Milwaukee, supra*, 406 U.S. 91, the Court denied Illinois' petition for leave to file an original action under 28 U.S.C. § 1251(a)(1),[6] on the ground that

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[4] *See, e.g., French v. Clinchfield Coal Company*, 407 F.Supp. 13, 16-17 n. 11 (D.Del. 1976) (Caleb Wright, J.); *Hasburgh v. Executive Aircraft Company*, 35 F.R.D. 354, 355 (W.D.Mo. 1964); *see generally* 1 *Moore's Federal Practice* § 0.142 [2.—1]; 1368-1369 & nn. 40-41 (1978); Wright, *Law of Federal Courts* 158 (2d ed. 1970); Wright, Miller & Cooper, 15 *Federal Practice and Procedure* § 3822 (1976).

[5] There is some debate as to whether there ought to be a uniform rule of law in federal courts governing the question of whether an action is "local" or "transitory." *See, e.g., French v. Clinchfield, supra*, 407 F.Supp. at 16-17 n. 11; Wright, Miller & Cooper, *supra*, § 3822 at 129-130; 1 *Moore's Federal Practice, supra*, at 1368-1369 & n. 40. *Illinois v. Milwaukee, supra*, 406 U.S. 108 n. 10, can also be understood as resolving this debate in favor of a uniform federal rule, at least in federal common law nuisance actions, and as indicating that such actions should be treated as "transitory." Under either interpretation of the language, § 1391(b) is applicable and venue was proper.

[6] That provision states,

> The Supreme Court shall have original and exclusive jurisdiction of: (1) All controversies between two or more States; . . . .

"States," as used in that provision, does not include political subdivisions. *Id.* at 98. The Court also declined to exercise its jurisdiction under 28 U.S.C. § 1251(b)(3),[7] since the issues raised in the complaint were governed by federal common law, and therefore an appropriate district court would have jurisdiction of the case under 28 U.S.C. § 1331(a).[8] After reviewing the provisions of the Federal Water Pollution Control Act, 62 Stat. 1155,[9] and other federal legislation regulating pollution of interstate waters, the Court held that federal common law had not been preempted, but noted "that new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance." *Id.* at 107. Shortly after that decision Congress adopted the comprehensive Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, 86 Stat. 816. In 1977 Congress further amended the Act. P.L. 95-217, 91 Stat. 1566. Defendants concede that neither the 1972 nor the 1977 amendments preempt the federal common law of nuisance. Wisconsin's brief *amicus curiae*, however, argues that the comprehensive statutory scheme preempts the common law. The brief of the United States as *amicus curiae* argues to the contrary. Since the issue concerns our jurisdiction, we are obliged to consider it. *See, e.g., American Meat Institute v. EPA*, 526 F.2d 442, 448-449 (7th Cir. 1975). In addition, we consider whether the statute, even if it does not preempt the federal common law, limits the relief that may appropriately be granted or otherwise influences the principles to be applied in this action.

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[7] That provision states,
> The Supreme Court shall have original but not exclusive jurisdiction of: . . . (3) All actions . . . by a State against the citizens of another State . . . .

[8] That provision states,
> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the . . . laws . . . of the United States . . . .

[9] For the provisions of the statute as amended at the time of the Court's decision *see* 33 U.S.C. § 1151 *et seq.* (1970).

A. *Federal Water Pollution Control Act*

1. *The Statute Before 1972*

The pre-1972 Federal Water Pollution Control Act, 62 Stat. 1155, as amended, 33 U.S.C. 1151, *et seq.* (1970), authorized each state, with the approval of the Secretary of the Interior, to adopt "water quality criteria applicable to interstate waters or portions thereof within" the state, 33 U.S.C. § 1160(c)(1) (1970), for the purposes of protecting the public health or welfare and enhancing the quality of water, *see* 33 U.S.C. § 1160(c)(3) (1970). If any state failed to adopt acceptable water quality criteria, the Act authorized the Secretary of the Interior to prescribe them, 33 U.S.C. § 1160(c)(2) (1970); water quality standards prescribed by the Secretary were subject to modification after review by a "Hearing Board" on petition of the governor of any state affected by the standards, 33 U.S.C. § 1160(c)(4) (1970). The Act also provided enforcement procedures, recently described by the Supreme Court as "cumbrous." *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 202 (1976); *see also Illinois v. Milwaukee*, *supra*, 406 U.S. at 103 (describing the enforcement procedures as "long" and "drawn-out").

The procedures for abating pollution originating in one state but allegedly causing harm in a second state are of primary importance for our purposes. The Act provided that upon complaint of the governor or water pollution control agency of the second state, the Secretary should call a conference, giving all the interested parties notice of, and an opportunity to make statements at, the conference. 33 U.S.C. § 1160(d)(1), (3) (1970). After the conference, the Secretary was directed to prepare a report for the benefit of the state agencies represented at the conference in which he summarized the proceedings and discussed, among other things, the adequacy of the measures taken to abate the pollution. 33 U.S.C. § 1160(d)(4) (1970). If the measures already taken were deemed inadequate, the Secretary was to recommend appropriate remedial action to the water pollution agency in the state from which the pollution

came. 33 U.S.C. § 1160(e) (1970). If after "at least six months" the state agency had not taken the necessary action, the Secretary was directed to conduct hearings at which all the interested parties would again be given an opportunity to make statements, this time before a "Hearing Board." 33 U.S.C. § 1160(f)(1) (1970). If the Hearing Board found that pollution endangering the public health or welfare was indeed occurring and that adequate steps toward abatement had not been taken, it submitted its findings and recommendations "concerning the measures, if any, which it [found] to be reasonable and equitable to secure abatement of such pollution." *Id.* The Secretary then forwarded the Hearing Board's findings and recommendations "together with a notice specifying a reasonable time (not less than six months) to secure abatement of such pollution" to the polluters and the originating state's water pollution control agency. *Id.* If the polluter or state agency failed to take "action reasonably calculated to secure abatement" within the specified time, then the Secretary was authorized to request the Attorney General to file suit to secure abatement. 33 U.S.C. § 1160(g)(1) (1970). Discharges that reduced the quality of water below any "water quality criteria" established under the Act were subject to abatement pursuant to similar procedures. 33 U.S.C. § 1160(c)(5) (1970) The Act made no provision for private abatement suits.

It is this system of interstate water pollution abatement, in combination with the discharge permit system administered by the Army Corps of Engineers, see note 16, *infra*, and other federal legislation, that the Court found insufficient to preempt the federal common law of interstate water pollution in *Illinois v. Milwaukee*, *supra*, 406 U.S. at 101-103, 107.

2. *The 1972 Act*

Because of the inadequacies inherent in the "water quality" approach and, among other things, the ineffectiveness of the enforcement procedures described

above,[10] Congress adopted the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251, *et seq.* The 1972 amendments, which we sometimes refer to herein as the Act or FWPCA, substantially rewrote the statute, supplementing the water quality criteria with direct discharge limitations and greatly strengthening enforcement procedures. Congress declared that the national goal was to eliminate the discharge of pollutants into navigable waters by 1985. To achieve that goal, Congress established general technology-based levels of treatment for any pollutant that is to be discharged into navigable waters and specified dates by which those levels of treatment are to be achieved, § 301;[11] all point sources[12] except publicly owned treatment works[13] must

[10] *See* S.Rep. No. 92-414, reprinted in [1972] *U.S. Code Cong. & Ad. News* 3668, 3671-3674 (1972); *see also* Note, "Federal Common Law in Interstate Water Pollution Disputes," 1973 *U. Ill. L. F.* 141, 143-144 & nn. 12-14.

[11] Sections of the 1972 Act (P.L. 92-500, 86 Stat. 816) are referred to in this opinion by their designations in the Statutes at Large. The parallel United States Code citations for the sections to which reference is made are as follows:

Section 101	—	33 U.S.C. § 1251
Section 201	—	33 U.S.C. § 1281
Section 212	—	33 U.S.C. § 1292
Section 301	—	33 U.S.C. § 1311
Section 304	—	33 U.S.C. § 1314
Section 309	—	33 U.S.C. § 1319
Section 402	—	33 U.S.C. § 1342
Section 502	—	33 U.S.C. § 1362
Section 505	—	33 U.S.C. § 1365
Section 510	—	33 U.S.C. § 1370
Section 511	—	33 U.S.C. § 1371

[12] "Point source" is defined as "any discernible, confined and discrete conveyance, . . . from which pollutants are or may be discharged." § 502(14).

[13] For purposes of "Title II—Grants for Construction of Treatment Works," treatment works are defined as "any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature to implement section 201 of this Act [which is designed to encourage the development of the "best practicable waste treatment" over the life of the treatment work]

(Footnote continued on following page)

adopt the "best practicable control technology currently available" by July 1, 1977, and the "best available technology economically achievable" by July 1, 1983, §§ 301(b)(1)(A), (2)(A); publicly owned treatment works are required to adopt "secondary treatment" by July 1, 1977 and "the best practicable waste treatment over the life of the [treatment] works" by July 1, 1983, §§ 301(b)(1)(B), (2)(B), and 201(g)(2)(A). The Act directs the Administrator of the Environmental Protection Agency (EPA)[14] to prescribe the specific effluent limitations achievable using "best practicable" treatment technology, §§ 301(b)(1)(A), 304(b)(1), "best available" treatment technology, §§ 301(b)(2)(A), 304(b)(2), and "secondary" treatment technology, §§ 301(b)(1)(B), 304(d)(1). *See, e.g., E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 126-136 (1977); *American Meat Institute v. EPA, supra*, 526 F.2d at 448-452. In addition, all point sources, presumably including publicly owned treatment works, must comply with "any more stringent limitation . . . established pursuant to any state law or regulations (under authority preserved by § 510)[15] or any other Federal law or regulations . . . ." § 301(b)(1)(C).

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[13] *continued*

. . . . [and] any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste, including storm water runoff, or industrial waste, including waste in combined storm water and sanitary sewer systems." §§ 212(2)(A), (B). Although "treatment works" is not defined for purposes of "Title III—Standards and Enforcement," the definitions provided in § 212 provide an indication of what may have been intended. We recently noted that "[a]n earlier specific definition may properly color a subsequent use of the same words without redefinition," quoting from *Kent Mfg. Corp. v. Commissioner*, 288 F.2d 812, 815 (4th Cir. 1961). *Nachman Corp. v. Pension Benefit Guaranty Corp.*, ... F.2d ..... , ... n. 6 (7th Cir. 1979).

[14] "EPA" in this opinion includes the administrator and the agency.

[15] Section 510 provides,

> Except as expressly provided . . . nothing in this Act shall (1) preclude or deny the right of any State or

(Footnote continued on following page)

The 1972 Act also created a permit system, called the National Pollutant Discharge Elimination System (NPDES), under which discharge permits may be granted by EPA or, where a state provides satisfactory assurances that it will enforce the requirements of the Act and EPA regulations, a designated agency of the state.[16] Any discharges, except in compliance with the limitations imposed in a permit, are declared unlawful. § 301(a). A permit must require the discharger to meet the minimum effluent limitations prescribed in the Act and EPA regulations. § 402(b)(1)(A).

Each state agency established under the National Pollutant Discharge Elimination System is required to notify EPA of any permit to be issued under the program. § 402(d)(1). If, under the permit, the waters of another state "may be affected," the agency is required to notify the other state, to give the other state an opportunity to submit written recommendations concerning the limitations to be imposed in the permit, and, if those recommendations are not adopted, to explain why in writing to EPA and the other state. §§ 402(b)(3), (5).

EPA may veto the issuance of any discharge permit if the waters of a state other than the issuing state may be

[15] *continued*
political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any . . . less stringent . . . effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard or standard of performance . . . ; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to waters . . . of such States.

[16] This system replaced the permit system formerly administered by the Army Corps of Engineers under the Act of 1899, 30 Stat. 1152, 33 U.S.C. § 407. *United States Steel Corp. v. Train*, 556 F.2d 822, 831 & n. 7 (7th Cir. 1977); *American Meat Institute v. EPA*, *supra*, 526 F.2d at 446.

suggests that use of the higher standard was a part of an accommodation devised to enable the Supreme Court, structured as it is "to perform as an appellate tribunal," *id.* at 498, to cope with original actions in that Court involving interstate disputes regarding air and water pollution.[29] He also indicated that the higher standard of proof might be appropriate in original actions against private defendants as well. *Id.* at 501 n.4. Justice Harlan's rationale for requiring the higher standard of proof is inapplicable when the action is tried in a trial court; and the alternative, sovereign state rationale recognized in the earlier cases is inapplicable here, *cf. Illinois v. Milwaukee*, *supra*, 406 U.S. at 98 (political subdivisions of a state are not "States" as used in 28 U.S.C. § 1251(a)(1), see note 6, *supra*). Accordingly, we think the correct standard of proof in this case is a preponderance of the evidence[30] rather than clear and convincing evidence, although we can say, as did the district court, that use of either standard would produce the same result.

IV.

Sufficiency of the Evidence Supporting Findings of Fact

The district court found that the defendants dump substantial quantities of pathogen-containing sewage into Lake Michigan each year, that the lake currents

[29] The complementary part of the accommodation was that the Court imposed on itself "the duty of applying only legal principles 'which [it] is prepared to maintain against all considerations on the other side. . . .'" *Id.* at 501.

[30] Although federal law governs, we note that some state courts have also adopted the preponderance standard in nuisance cases. *See, e.g., City of Northlake v. City of Elmhurst*, 41 Ill. App. 2d 190, 197, 190 N.E.2d 375, 379 (1963); *Iowa v. Miller*, 250 Ia. 1369, 1373, 98 N.W.2d 859, 860 (1959); *Findley Lake Property Owners v. Town of Mina*, 31 Misc.2d 356, 154 N.Y.S. 2d 775, 795 (N.Y.Sup.Ct. 1956); *Welborn v. Page*, 247 S.C. 554, 563, 148 S.E. 2d 375, 379 (1966); *see also Boller v. Texas Eastern Transmission*, 87 F.Supp. 603, 605 (E.D. Mo. 1949) (diversity case).

affected. §§ 402(d)(2)(A), (b)(5). It is not clear whether the veto can be based on a ground other than violation of a standard imposed pursuant to the Act by EPA or a state. The language of § 402(d)(2)(A) suggests that it can.[17] The legislative history, however, indicates that the veto must be based upon the issuing state's failure to impose limitations sufficient to assure that applicable effluent limitations, either those imposed under the Act by EPA or those imposed by the affected state, are respected.[18] Since there has been no veto here, it is unnecessary for us to resolve this ambiguity.

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[17] Section 402(d)(2) provides that,

> No permit shall issue (A) if the Administrator within ninety days of his notification under subsection (b)(5) of [402] objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act.

Comparison of §§ 402(d)(2)(A) and (B) suggest that, although vetoes must usually be based on a violation of the effluent limitations imposed under the Act, there is no such requirement where the interests of a second state are involved. *But cf.* § 505(h) (authorizing governor's suit against Administrator of EPA, but only for failure to enforce effluent limitations imposed under the Act against a point source in another state resulting in harm to waters in governor's state) quoted in note 19, *infra; see also* § 505(a) (citizens' suits to enforce limitations imposed under the Act).

[18] The Administrator's general veto authority is expressly limited to cases in which the minimum limitations imposed under the Act are violated. § 402(d)(2)(B). The Senate version of the Act, S. 2770, provided that no permit could be issued by any state agency "until the Administrator is satisfied that the conditions imposed by the State meet the requirements of this Act." S. 2770, 92d Cong., 1st Sess. § 402(d)(2) (1971), reprinted in 117 Cong. Rec. 38865, 38883 (1971); Library of Congress, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 1534, 1690 (1973). The House version of the Act, H.R. 11896, specifically rejected the permit-by-permit review approach S. 2770 and only authorized the Administrator to veto those permits under which the waters of a second state might be affected. H.R. 11896, 92d. Cong., 2d Sess. § 402(d)(2) (1972), reprinted in 118 Cong. Rec. 10804,

(Footnote continued on following page)

The 1972 Act also substantially modified enforcement procedures. "Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation" imposed under the Act, including those contained in state-issued discharge permits, he may at his option "issue an order requiring such person to comply," commence a civil action for appropriate relief in a federal district court, or notify the appropriate state agency of the violation. §§ 309(a)(1), (3), (b). If the latter course is chosen and after 30 days the state agency has not taken appropriate action to secure compliance, the Administrator must exercise one of the first two options. § 309(a).

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[1] *continued*
10824 (1972); 1 *Legis. Hist., supra*, 893, 1058-1059. In part, the Act incorporates the provisions of both S. 2770 and H.R. 11896. *See* note 17, *supra*.

The House provision was intended as a state-permit analogue to the provisions of H.R. 11896, *supra*, § 401, which requires every applicant for a federal license to secure a statement from the appropriate state to the effect that no applicable effluent limitation will be violated by the activity for which the license is sought. *See* H.R. Rep. No. 92-911, 92d Cong. 2d Sess., reprinted in *Legis. Hist., supra*, 753, 808-814. Concerning H.R. 11896, § 402(d)(2), the House Committee explained:

> The committee has included this procedure to protect States which might otherwise be affected by the issuance of a permit in a second State. This is similar to the safeguards given to States in the certification procedure under section 401. However, since permits granted by States under section 402 are not Federal permits—but State permits—the certification procedures are not applicable.

Id. at 814. As noted above the House specifically rejected the permit-by-permit review approach of the Senate bill, in favor of giving the individual states "maximum responsibility for the permit program." *See id. See also* the discussion of the 1977 amendments to the veto provisions, *infra*.

For more detailed discussions of the legislative history of the veto provisions see *Save the Bay v. Administrator of the Environmental Protection Agency*, 556 F.2d 1282, 1284-1287 (5th Cir. 1977); *Mianus River Preservation Committee v. Administrator of EPA*, 541 F.2d 899, 906-909 (2d Cir. 1976).

Criminal and civil penalties are provided in §§ 309(c) and (d).

In accord with the stated policy of encouraging "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established" under the Act, § 101(e), Congress authorized any "person . . . having an interest which is or may be affected" to file a civil action to secure compliance with the Act against any person alleged to be in violation of the provisions of the Act or against the Administrator if he fails to perform any nondiscretionary duty under the Act. §§ 505(a), (g).[19] But "[n]othing in [§ 505] shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." § 505(e).

3. *The 1977 Amendments.*[20]

The 1977 amendments are fairly extensive, but of limited significance for our purposes. In them Congress modified the National Pollutant Discharge Elimination System to provide that when EPA objects to the issuance of a permit, it must also state "the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator." § 65(b), 91 Stat. 1599, as amended, 33 U.S.C.A. § 1342(d)(2). A procedure was provided to avoid the impasse that had been possible under the 1972

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[19] Also, the governor of a state may file a civil action against the Administrator "where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this Act the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State." § 505(h).

[20] Clean Water Act of 1977, P.L. 95-217, 91 Stat. 1566 (to be codified 33 U.S.C. §§ 1251 *et seq.*).

Act when EPA objected to the issuance of a specific permit but the state agency refused to issue a modified permit; under the amendments, if EPA "objects to the issuance of a permit," the issuing state is entitled to a public hearing on the objection. § 65(a), 91 Stat. 1599, as amended, 33 U.S.C.A. § 1342(d)(4); *see* S.Rep.No. 95-370, 95th Cong., 1st Sess. 73, reprinted in [1977] *U.S. Code Cong. & Ad. News* 4326, 4398; H.R. Rep. No. 95-830, 95th Cong., 1st Sess. 96-97, reprinted in [1977] *U.S. Code Cong. & Ad. News* 4424, 4471-4472. If the state either fails to request a hearing within 90 days of the objection or fails to submit a revised permit meeting the objection, then EPA may issue a permit itself "in accordance with the guidelines and requirements" of the Act § 65(a), *supra.*

Congress also adopted provisions authorizing EPA, with the concurrence of the State in which the point source is located, under limited circumstances, to modify the dates by which the effluent levels established in the 1972 Act for all point sources must be met. *See* §§ 43, 44, 45, 91 Stat. 1583-1586, as amended, 33 U.S.C.A. §§ 1311(g), (h), (i). The provisions applicable to modification of compliance dates for publicly owned treatment works are of particular significance here. Where construction is necessary for compliance with the "secondary treatment" or "more stringent" requirements of the 1972 Act, §§ 301(b)(1)(B), (C), but cannot be completed in time to meet these requirements or "the United States has failed to make financial assistance . . . available in time to achieve such limitations . . . ," EPA or the appropriate state agency may extend the compliance date to July 1, 1983. § 45, 91 Stat. 1584-1585, as amended, 33 U.S.C.A. § 1311(i). The language and legislative history of this provision, however, make it clear that the maximum compliance possible at the time must be achieved throughout the period and complete compliance achieved at the "earliest date practically possible." *Id.;* S. Rep. No. 95-370, 95th Cong., 1st Sess. 47, reprinted in [1977] *U.S. Code Cong. & Ad. News* at 4372. The 1977 amendments also provide for pollutant-specific modifications of the requirements of the 1972 Act. § 44, 91 Stat. 1584, as amended, 33 U.S.C.A. § 1311(h). Upon

an adequate showing that, among other things, "there is an applicable water quality standard specific to the pollutant for which the modification is requested" and the modification would "not interfere with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection . . . of a balanced . . . population of shellfish, fish, and wildlife, and allows recreational activities, in or on the water . . . ," EPA, "with the concurrence of the State, may issue a permit . . . which modifies the secondary treatment effluent limitations prescribed under the Act for publicly owned treatment works." *Id.*

The only other provision of the 1977 amendments that is of significance for our purposes directs EPA to conduct a study and report to Congress on "the status of combined sewer overflows in municipal treatment works operations." § 70, 91 Stat. 1608, as amended, 33 U.S.C.A. § 1375(c). The Senate committee studying the proposed legislation noted that "the second largest category of municipal needs identified in the 1976 National needs list is the correction of combined sewer overflows . . . . Examples brought to the committee's attention showed combined sewer overflow problems to be a significant source of untreated sewage to the Nation's waters." S. Rep. No. 95-370, *supra*, 81, reprinted in [1977] *U.S. Code Cong. & Ad. News*, *supra*, 4406. One of the purposes of the report is to determine whether new legislation to address the problem is needed. § 70, 91 Stat. 1608, as amended, 33 U.S.C.A. § 1375(c).

B. *Preemption and Compliance with the Statute As a Defense*

Congress has thus established a comprehensive and detailed system for the regulation and eventual elimination of pollutant discharges into the nation's waters. Nevertheless, Congress has expressly stated that the effluent limitations imposed under the Act do not preclude the establishment of more stringent limitations by any state, § 510, *see United States Steel Corp. v. Train*, *supra*, 556 F.2d at 835-836, 837-838; and nothing in the Act is to be construed as "limiting the authority of any officer or agency of the United States under any

other law or regulation not inconsistent with [the] Act; . . . ." § 511(a). The language of § 511(a) is arguably broad enough to include the federal courts and, when read in the light of § 510, suggests, if it does not require, the conclusion that Congress did not intend to preempt the federal common law of nuisance. The imposition of effluent limitations more stringent than those required under the Act, if necessary to prevent harm to a complaining party, is fully consistent with the provisions of the Act. Because of the shared authority between the federal government and the individual states established in the Act, it is plain that uniformity was not thought necessary. Even the minimum effluent limitations prescribed in the Act are not uniform because the provisions for the ad hoc modification of the degree of compliance required for specific point sources will necessarily lead to variation.

While providing in § 505 for private suits to enforce the effluent limitations prescribed in the Act, Congress specifically stated that nothing in the section "shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . ," thus indicating that preemption of existing remedies was not intended. There is nothing in the phrase "any statute or common law" that suggests that this provision is limited to state common law. There is no reason to believe that Congress would have wished to preserve state common law claims and preclude federal common law claims. The preservation of all existing remedies is consistent with the recognition in this Act of the value of public participation in all aspects of the effort "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," exemplified by the direction to EPA and states participating in the national discharge permit system to encourage such participation. *See also Citizens for a Better Environment v. EPA*, ... F.2d ..... , ... (7th Cir. 1979). We conclude that the federal common law of nuisance has not been preempted by the Act.

For the same reasons, we reject defendants' contention that compliance with a discharge permit issued under the Act is a defense in an action based on the federal common law of nuisance. *Cf. New York v. New Jersey*, 256 U.S. 296, 308 (1921) (in which the Court noted a construction permit issued by the Secretary of War, presumably under the provisions of the Rivers and Harbors Act of 1899 that were replaced by § 402 of the 1972 Act, see note 16, *supra*, incorporating discharge limitations adopted in a settlement agreement with United States but did not regard the limitations as dispositive in New York's action against New Jersey); *Baltimore & Potomac R. Co. v. Fifth Baptist Church*, 108 U.S. 317 (1883) (rejecting the defendant railroad's arguments that compliance with District of Columbia smoke stack regulations, the existence of a federal charter authorizing defendants to "make and construct all works whatever which might be necessary and expedient," or congressional approval of the train route constituted a defense in a nuisance action when plaintiff suffered injury resulting from defendant's activity).[21] *But*

[21] The law of Wisconsin is in accord. *See, e.g., Winchell v. Waukesha*, 110 Wis. 101, 109, 85 N.W. 668, 670 (1901) ("The great weight of authority, American and English, supports the view that legislative authority to install a sewer system carries no implication of authority to create or maintain a nuisance. . . . If such nuisance be created, the same remedies may be invoked as if the perpetrator were an individual."); *Costas v. City of Fond du Lac*, 24 Wis. 2d 409, 415-416, 129 N.W.2d 217, 220-221 (1964) (operation of sewage plant in accord with state specifications, orders, and regulations is no defense in nuisance action). For other state cases to the same effect, *see, e.g., People of the State of California v. Los Angeles*, 160 Cal. App. 2d 494, 505-506, 325 P.2d 639, 645 (Ct. App. 1958); cases cited in Annotation, "Sewage Disposal Plant as Nuisance," 40 ALR 2d 1177, 1182-1186 (1955), Later Case Service, 40 ALR 2d 77, 77 (1969), Later Case Service Supp. 42, 42 (1978); cases cited in Annotation, "Right to, and Propriety of Injunction Against Nuisance for Discharge of City Sewage," 77 L.Ed. 1213, 1227-1231 (1933); cases cited in Davis, "Theories of Water Pollution Litigation," 1971 Wis. L. Rev. 738, 768 n. 138, 771 n. 148 (1971); *cf. Venuto v. Owens Corning Fiberglass*, 22 Cal. App. 3d 116, 128-129, 99 Cal. Rptr. 350, 358-359 (1971) (air pollution).

compare Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. (54 U.S.) 518 (1851) *with Pennsylvania v. Wheeling Bridge Co.*, 18 How. (59 U.S.) 421 (1856) *and Northern Transportation Co. v. Chicago*, 9 Otto (99 U.S.) 635 (1879).

C. *Limitations on Relief*

Defendants contend that even if the Act does not preempt the federal common law of nuisance, and even if compliance with the Act is not a defense, no more stringent relief can be granted by way of abatement than the federal minimum prescribed by the Act and EPA. In other words, although the federal government need not speak with a single voice, the words must be the same. As noted above, however, Congress has expressly stated that nothing in the Act should be read to limit the authority of any federal "officer or agency" so long as that authority is consistent with the provisions of the Act. Consistency does not require uniformity; the provision expressly preserving the authority of the states to impose limitations more stringent than those required under the Act, § 510, indicates that Congress did not think more stringent limitations inconsistent with the Act. Moreover, the savings clause, § 505(e), speaks not only of rights, but also of remedies. Since any effluent limitations less stringent than those provided in the Act, except pursuant to the modification procedures established, are prohibited, § 505(e) must contemplate more stringent limitations than those imposed in the Act. If accepted, defendants' argument would reduce a cause of action under the federal common law to no more than an alternative avenue for enforcement of the statute. For the reasons stated above, we do not think that Congress intended any such restriction or that the statute, fairly read, limits the relief available in a federal court.

D. *Common Law of the Statute*

The conclusion that the Federal Water Pollution Control Act, as amended, does not preempt the federal com-

mon law of nuisance or limit the relief available in this case does not render that Act irrelevant. A statute that does not by its terms govern the case before a court may contain indications of the legislature's judgment on relevant issues of policy or provide an appropriate principle for decision of the case.[22] In applying the federal common law of nuisance in a water pollution case, a court should not ignore the Act but should look to its policies and principles for guidance. *See Illinois v. Milwaukee, supra*, 406 U.S. at 103 n.5; *cf. Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-457 (1957).

The Act contains no rules or principles that control in this case. We think, however, that the minimum treatment standards found acceptable by Congress and the effluent limitations imposed under the system established in the Act provide an appropriate starting point. *Cf., e.g., Wallis v. Pan American Petroleum*, 384 U.S. 63, 69 (1966). In the 1972 Act, Congress said that by July 1, 1977, publicly owned treatment works must, with several significant exceptions, adopt "secondary" treatment. That command was qualified by the 1977 amendments authorizing EPA or the appropriate state agency to extend the time for compliance with the secondary treatment standard to July 1, 1983. The Act's generally more stringent second stage provisions only require "the application of the best practicable waste treatment technology *over the life of the works* . . . ," by July 1, 1983. §§ 301(b)(2)(B), 201(g)(2)(A) (emphasis added). Thus, Congress has approved secondary treatment

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[22] *See, e.g., Moragne v. States Marine Lines*, 398 U.S. 375, 390-393, 406-408 (1970); Landis, "Statutes and the Sources of Law," *Harvard Legal Essays* 213 (1934), reprinted in 2 *Harv. J. Legis.* 7, 12-19, 21-22 (1965); Page, "Statutes as Common Law Principles," 1944 *Wis. L. Rev.* 175, 186-211; Schaefer, "Precedent and Policy," 34 *U. Chi. L. Rev.* 3, 20-22 (1966); Stone, "The Common Law in the United States," 50 *Harv. L. Rev.* 4, 14-15 (1936); Traynor, "Statutes Revolving in Common-Law Orbits," 17 *Cath. U. L. Rev.* 401, 403-408, 412-417, 421-424 (1968).

as an acceptable minimum for publicly owned treatment works at least until 1983 and perhaps later.[23]

EPA has defined secondary treatment for the purposes of the Act in terms of resulting effluent quality. 40 C.F.R. § 133.102. Even though states are authorized to establish more stringent effluent limitations than those required by EPA, §§ 402, 510, there appear to be no Wisconsin regulations imposing more stringent standards, and the NPDES permits issued by the Wisconsin agency to the defendants in this case impose limitations no more stringent than those required by EPA.[24]

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[23] Comparison of the treatment levels demanded of publicly owned treatment works and those demanded of all other point sources suggests that Congress was of the view that publicly owned treatment works should be subject to less stringent standards than other point sources. Point sources other than publicly owned treatment works were required to implement the "best practicable control technology currently available," as determined by EPA, by July 1, 1977. § 301(b)(1)(A). Senator Muskie, the "principal author of the Act," *see American Meat Institute v. EPA*, *supra*, 526 F.2d at 451, expressed the view that although EPA had authority to define "best practicable" as "the equivalent of secondary treatment for industry," more stringent requirements might also be imposed, 1 *Legislative History of the Water Pollution Control Act Amendments of 1972* 167-170 (1973), quoted in *American Meat Institute v. EPA*, *supra*, 526 F.2d at 453. The 1972 Act required point sources other than publicly owned treatment works to implement "best available treatment" by 1983, § 301(b)(2)(A); the 1977 amendments modified this provision to require "best conventional treatment" for pollutants identified by EPA as "conventional" by July 1, 1984, and "best available treatment" for other pollutants, no later than July 1, 1987. § 42, 91 Stat. 1582-1583, as amended, 33 U.S.C.A. §§ 1311(b)(2)(A), (E), (F).

[24] EPA has not vetoed the permits issued by the Wisconsin agency. *See* notes 17 and 18, *supra*, and accompanying text. Before filing this action, Illinois invoked the enforcement procedures of the pre-1972 Act, *see*, Note, "Federal Common Law in Interstate Disputes," *supra*, 1973 *U. Ill. L. F.* at 144 & nn. 17-19, but apparently chose not to pursue the remedy provided in § 402(b)(5) and did not attempt to have EPA veto the permits issued to the defendants under § 402(d)(2)(A).

As we shall explain in more detail below, the effluent limitations contained in the permits are less stringent than those imposed by the district court in this case. In addition, the permits contain no prohibitions against discharges of raw sewage through overflows.

While it is appropriate to give weight to Congress' expectations in adopting the Act and the standards established by EPA pursuant to the Act, we cannot forget that Congress deliberately chose to preserve existing rights and remedies. Thus, if the evidence in this case shows that requirements more stringent than those imposed in the NPDES permits are necessary to protect Illinois residents from harm caused or threatened by the defendants' sewage discharges, plaintiffs are entitled to have the more stringent requirements imposed. We can think of no other reason for Congress' preserving previously existing rights and remedies than to protect the interests of those who would be able to show that the requirements imposed pursuant to the federal statute are inadequate to protect their interests. When the complaining party is a neighboring state, the federal common law of nuisance provides a peculiarly appropriate remedy.[25]

III.

Elements of the Claim, Relief, and Standard of Proof

The elements of a claim based on the federal common law of nuisance are simply that the defendant is carrying on an activity that is causing an injury or significant threat of injury to some cognizable interest of

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[25] Although the Administrator's power to veto permits that will result in harm to the waters of a second state provides some protection, as noted above, his authority may be limited to those cases in which the complaining state can point to some applicable effluent limitation or water quality standard that will be violated. Furthermore, the Administrator's power to waive review of permits issued to any category of point sources may render any protection that is provided by the veto provisions illusory. §§ 402(d)(3), (e), (f).

the complainant. *See Georgia v. Tennessee Copper*, 206 U.S. 230, 238-239 (1907).

It has been said that "in such a suit traditional limitations on equitable remedies are applicable." *United States v. Stoeco Homes*, 498 F.2d 597, 611 (3d Cir. 1974). This would mean that an injunction would be granted only when the right to relief is clear and the remedy at law inadequate. *Missouri v. Illinois*, 180 U.S. 208, 248 (1901); Wright & Miller, 11 *Federal Practice and Procedure*, § 2942, 364, 368-369 (1973); *see also Mugler v. Kansas*, 123 U.S. 623, 672-673 (1887).[26] But when a state complains of pollution originating outside its territory the rules are different:

> If the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be . . . .
>
> It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted . . . by the act of persons beyond its control . . . . If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether, for the injuries which they might be suffering to their property they should not be left to an action at law.

Georgia v. Tennessee Copper, supra, 206 U.S. at 237-238. Moreover, when the polluting activity is shown to endanger the public health, injunctive relief is generally appropriate. *See Harrison v. Indiana Auto Shredders Co.*, 528 F.2d 1107, 1122-1123 (7th Cir. 1976) (diversity case applying Indiana law).

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[26] For state law cases to the same effect *see, e.g., Green v. Smith*, 231 Ark. 94, 96, 328 S.W.2d 357, 359 (1959); *Delaware Optometric Association v. Sherwood*, 35 Del. Ch. 507, 511, 122 A.2d 424, 427 (1956); *City of Pana v. Central Washed Coal Co.*, 260 Ill. 111, 122-123, 102 N.E. 992, 997 (1932); *City of Chicago v. Commonwealth Edison Company*, 24 Ill. App. 3d 624, 632, 321 N.E.2d 412, 418 (1974); *Harden Chevrolet v. Pickaway Grain Co.*, 27 Ohio Ops. 144, 147, 194 N.E.2d 177, 180 (Ct.C.Pl. Ohio 1961); *Wade v. Fuller*, 12 Utah 2d 299, 301, 365 P.2d 802, 804 (1961).

Similarly, while determining whether to issue an injunction generally involves a balancing of the interests of the parties,[27] Wright & Miller, *supra*, § 2942 at 366-367 & n.43, the balance is of less importance when the plaintiff is a sovereign state. *See Georgia v. Tennessee Copper*, *supra*, 206 U.S. at 238. And if the pollution endangers the public health, injunctive relief is proper, without resort to any balancing. *See Harrison v. Indiana Auto*, *supra*, 528 F.2d at 1122-1123.

In exercising its original jurisdiction in interstate pollution cases, the Supreme Court has applied a preponderance of the evidence standard when the defendant is a private party, *Georgia v. Tennessee Copper*, *supra*, 206 U.S. at 238-239, but a clear and convincing evidence standard when the defendant is a state, *New York v. New Jersey*, 256 U.S 296, 309 (1921); *Missouri v. Illinois*, 200 U.S. 496, 520-522 (1906).[28] In both *New York v. New Jersey* and *Missouri v. Illinois*, *supra*, 200 U.S. at 520-522, use of the higher standard was attributed to the sovereign status of the defendant. For example, in *New York v. New Jersey* the Court explained that

> the burden upon the state of New York of sustaining the allegations of its bill is much greater than that imposed upon a complainant in an ordinary suit between private parties. Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence.

New York v. New Jersey, *supra*, 256 U.S. at 309. Justice Harlan's opinion for the Court in *Ohio v. Wyandotte Chemicals*, *supra*, 401 U.S. at 501-502, 504-505, however,

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[27] For state law cases using this balancing test, *see*, *e.g.*, Davis, "Theories of Water Pollution Litigation," 1971 Wis. L. Rev. 738, 766-767 n. 130; *see also Harrison v. Indiana Auto*, *supra*, 528 F.2d at 1123 (diversity case). Wisconsin courts apparently do not use the test. Davis, *supra*, at 767-768 n. 134.

[28] *See also Missouri v. Illinois*, *supra*, 180 U.S. at 248.

carry the pathogens into Illinois waters, where they may infect drinking water supplies and pose a danger to swimmers, and therefore that defendants' actions pose a significant risk of injury to Illinois residents. These findings are not clearly erroneous. Rule 52, Fed. R. Civ. P. The evidence supporting the findings, which we have carefully reviewed,[31] may be summarized as follows:

Any population as large as Milwaukee's will include carriers of enteroviruses,[32] who will excrete the viruses. Therefore the sewage of a city as large as Milwaukee inevitably contains these viruses. Similarly, the sewage of any large city will also contain pathogenic bacteria.

The sewer systems defendants operate have a total of approximately 239 bypass or overflow points from which untreated sewage escapes to flow directly or indirectly into Lake Michigan or into rivers that empty into the lake.[33] Most of these overflow points are either pumping

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[31] In an unpublished order filed with this opinion we discuss the evidentiary support for the district court's findings of fact in detail. Since this factual discussion is of little precedential value, we omit it from this opinion in favor of a short summary. *See* Circuit Rule 35.

[32] Enteroviruses, sometimes referred to as enteric viruses, are those that inhabit the gastroenteric tract of human beings. Many of these viruses are pathogenic, causing diseases such as polio, pleurodynia, myocarditis, meningitis, and encephalitis.

[33] Both of the defendant commissions act as agents of the Metropolitan Sewerage District of the County of Milwaukee, a municipal corporation that holds title to all property acquired by either commission but is not a defendant in this case. The city commission is responsible for "disposal of the sanitary and industrial sewage generated within the City of Milwaukee and to this end has established and maintained a system of intercepting sewers within the City and . . . operates the Jones Island and South Shore treatment plants; . . . ." The county commission is responsible for "collection and transportation of sanitary and industrial sewage from outside . . . Milwaukee but within the service area of the Metropolitan Sewerage District . . . for disposal at the Jones Island and South Shore treatment plants, all subject to approval by the City Commission; . . . ." *See generally Wis. Stat. Ann.* § 59.96(6) (West). The City of Milwaukee seems to be solely responsible for the sewers within its boundaries, other than the intercepting sewers.

(Footnote continued on following page)

stations or what are called "gravity overflows." Both types are triggered by the level of sewage in the system. In the former, pumps are activated by electrodes inside the sewer when the sewage flow reaches the level of the electrodes; when the pumps are activated, raw sewage is either pumped into storm sewers, which empty into rivers that in turn empty into Lake Michigan, or dumped directly into the rivers. The gravity overflows are simply pipes placed inside the sewers; when the sewage level rises to that of the pipes, raw sewage pours out into either storm sewers or rivers and then into Lake Michigan. Since both types of overflow points are activated by the level of sewage, an overload or a blockage in the sewers that causes the sewage level to rise will cause overflows, even if the sewer capacity would otherwise be adequate. Because ground water and water from storm sewers sometimes "infiltrates" or flows into sanitary sewers, overflows from the sanitary sewers, as well as from combined sewers, are especially likely during wet weather. In a single month in 1976 the untreated sewage discharged from just 11 of the 239 overflow points totalled 646.46 million gallons.

In addition to the pathogens in the raw sewage that the defendants dump into Lake Michigan, pathogens are contained in the effluent that the South Shore and Jones Island treatment plants discharge directly and indirectly into Lake Michigan[34] when treatment of sewage at

[33] *continued*

There are 18 bypass points and 31 overflow points on the Metropolitan (or Main) Interceptor System, which is the network of sanitary sewers in the Milwaukee metropolitan area that carries sewage to the Jones Island and South Shore treatment plants. Sewage generated in the 26 municipalities within the area first flows into a "lateral sewer" and from there into "local collector sewers," which connect with the Metropolitan Interceptor System. There are 78 overflow points (called "crossovers") on Milwaukee's sanitary sewer system and 112 overflow points on the city's combination storm water and sanitary sewer system (called combined sewer overflows).

[34] South Shore effluent is discharged into Lake Michigan, but Jones Island effluent is discharged into the Milwaukee Harbor and from there flows into Lake Michigan.

those plants is inadequate, as it has sometimes been. Biochemical oxygen demand (BOD),[35] as an indicator of the presence of organic material, and the presence of suspended solids[36] are both significant factors in evaluating the adequacy of sewage treatment, especially as to virus and bacteria elimination.[37] EPA regulations and the discharge permits issued by the Wisconsin Department of Natural Resources for the Jones Island and South Shore plants require that the average daily BOD_5 (see note 35, *supra*) and suspended solids content of the effluent not exceed 30 milligrams per liter (mg/l) in any 30-day period. Not only were the 30-day average daily limitations frequently violated at Jones Island and South Shore, but also, on occasion, even if these limitations were met, discharges on individual days greatly exceeded the 30 mg/l limitation.[38]

The evidence established that, at temperatures between 40 and 70 degrees Fahrenheit, 90% of the bacteria discharged on any given day will generally

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[35] Biochemical oxygen demand (BOD) is an "index of the biodegradable organics present in the effluent." *Standard Methods for the Examination of Water and Wastewater*, 513, 544 (14th ed. 1975). BOD is generally "measured over a five-day period," *American Meat Institute v. EPA*, *supra*, 526 F.2d at 447, hence the abbreviation BOD_5.

[36] As the term suggests, "suspended solids" are "particles of organic and inorganic matter suspended in the water or floating on its surface." *American Meat Institute v. EPA*, *supra*, 526 F.2d at 447.

[37] Chlorine, contained in hypochlorous acid, is one of the most common disinfectants used in sewage treatment and is the only disinfectant used at either Jones Island or South Shore. Ammonia or nitrogen in organic material reacts with chlorine to form compounds that are either ineffective or less effective than hypochlorous acid as viricides and bactericides. Viruses or bacteria embedded in suspended solids, organic or inorganic, will be protected from effective chlorination.

[38] Both EPA regulations and the discharge permits impose seven-day daily average BOD_5 and suspended solids limitations of 45 mg/l. We note that on some occasions the defendants' individual day discharges absolutely precluded meeting the seven-day daily average.

"die-off" within two to four days, although they can survive for four to eight days. But, at temperatures between 40 and 50 degrees Fahrenheit, viruses will survive for months; even at 70 degrees, a temperature rarely reached by Lake Michigan except in July and August, viruses will survive for about two weeks. All of the witnesses who testified concerning the transport of pathogens discharged at Milwaukee into Illinois waters agreed that the southerly currents were strong enough and persisted long enough to carry the pathogens into Illinois waters in less than four days. They differed only as to the number of times that this could be expected to occur in a given year.

Pathogens discharged at Milwaukee will sometimes be carried into Illinois waters close enough to shore to come in contact with swimmers and to be taken in by water treatment plants. A swimmer can be infected by getting contaminated water into his mouth or nose or on a cut or abrasion on the skin. Drinking water can be contaminated by viruses or bacteria in lake water if a water treatment plant malfunctions because of human error or mechanical breakdown. Furthermore, there was evidence that viruses and bacteria can survive the treatment at a drinking water plant, even in the absence of error or breakdown. If viruses or bacteria contaminate the drinking water supplies, Illinois residents ingesting the water can of course become infected.

Defendants estimate that the effluent from Jones Island and South Shore contains about 1,100,000 pounds of phosphorus each year; the phosphorus content of defendants' raw sewage discharges is unmeasured. The district court found that this constituted a substantial contribution to the accelerated eutrophication of the water in the western in-shore zone of Lake Michigan, within the territorial boundaries of the State of Illinois, and also found that the State of Michigan was injured by accelerated eutrophication, aggravated by defendants' discharges.[39]

[39] "Eutrophication" is a natural process, and refers to the gradual increase of nutrient concentration in a body of water, which in turn causes increasing concentrations of phytoplank-

(Footnote continued on following page)

V.

Sufficiency of the Evidence Supporting the Relief Granted

A. *Relief Granted by the District Court*

The district court's judgment order requires the defendants to eliminate all overflows, defined as any "crossover, bypass, diversion structure, relief structure, pump station or any other device or mechanism by which human fecal waste is discharged directly or indirectly to public streams, rivers or lakes without collection and treatment," located outside the combined sewer system area by July 1, 1986. [Appendix 2.] As to the 112 combined sewer overflows, the defendants must construct a collection and conveyance system with a storage capacity of 2605 acre-feet[40] by December 31, 1989. Any overflow from this collection and conveyance system must receive minimum "treatment" consisting of "bar screen" filtering, followed by "drum screen" filtering, and chlorination. [App. at 5.] Defendants must either modify existing sewage treatment facilities or construct new facilities to treat all sewage, including that collected in the combined sewer collection and conveyance system, in order to meet the following effluent limitations by December 13, 1986:

> (1) based on 30 consecutive daily samples, an average of 5 mg/l suspended solids, provided that no single sample exceed 10 mg/l suspended solids;

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[39] *continued*

ton and other living organisms. Man's nutrient inputs may, however, accelerate the evolution. Liminologists regard phosphorus as a "controlling element" in the process. Since phosphorus is necessary to support the growth of phytoplankton, limiting phosphorus imposes an upper limit on the external manifestations of eutrophication, which include reduction of clarity and oxygen content, production of obnoxious odors, and reduction of the quality of drinking water supplies.

[40] An "acre-foot" is "the volume that would cover one acre to a depth of one foot." *Webster's Third New International Dictionary* (unabridged) 19 (1971).

(2) based on 30 consecutive daily samples, an average of 5 mg/l BOD_5, provided that no single sample exceed 10 mg/l BOD_5;

(3) based on daily samples, a free chlorine residual after 15 minutes exposure using the amperometric test;

(4) based on daily grab samples, fecal coliform counts not exceeding 40/100 ml; and

(5) based on daily sampling, a monthly average of 1 mg/l phosphorus. [App. at 6-7.]

The order also provides for evidentiary hearings to secure modifications of the order or to determine whether the provisions of the order have been violated. In any such hearing the defendants must bear the burden of proving by a preponderance of the evidence that the modification is necessary or that any alleged violation of the order did not occur or was excused.

B. *Overflows*

That part of the district court's order requiring defendants to eliminate all overflows outside the combined sewer system by July 1, 1986 and to construct a collection and conveyance system for the combined sewer system that will practically eliminate overflows on the combined sewer system by December 31, 1989 is supported by the evidence and is reasonable.

1. *Overflows Outside the Combined Sewer Area*

There appear to be no provisions in the Act or EPA regulations expressly forbidding the discharge of raw sewage into public waters from overflow points. Yet such a prohibition is at least implicit in the provisions of § 301.[41] It would be senseless to prohibit the discharge of effluent from publicly owned treatment works not meeting the secondary treatment requirements of § 301(b)(1)(B), if raw sewage can nonetheless be dis-

[41] *See also* §§ 212(2)(A), (B), quoted in note 13, *supra*; § 70, 91 Stat. 1608, as amended, 33 U.S.C.A. § 1375(c); S. Rep. No. 95-370, *supra*, at 81, reprinted in [1977] *U.S. Code Cong. & Ad. News*, *supra*, at 4406.

charged at will from overflow points before it reaches the treatment works. The discharge permits that the Wisconsin agency issued for the South Shore and Jones Island treatment plants prohibit, except under very limited conditions, any "diversion or bypass" of raw sewage *at the treatment works.* [Wisconsin Pollutant Discharge Elimination System Permits (WPDES Permits): WI-0024775, Part I, p.4 of 6 (South Shore), P.Ex. 63; WI-0024767, Part I, p.4 of 6 (Jones Island), P.Ex. 62.] Although the discharge permits do not otherwise prohibit overflow discharges, the permits do require the city commission to "initiate" programs "leading to the elimination or control of all discharge overflow and/or bypass points . . . ." [WPDES Permits: WI-0024775, *supra*, Part II, p.7 of 8; WI-0024767, *supra*, Part II, p.5 of 6.] Under the permits, plans for the elimination or control of overflows were to be submitted to the Wisconsin agency by December 31, 1975. It is not clear from the record whether any plans were submitted, or, if they were, what their terms were and what action was taken.

In any event, the provisions of these permits appear to have been modified. In July, 1976, the defendant commissions filed an action in a Wisconsin state court against the Wisconsin Department of Natural Resources, the state's discharge permit issuing agency, challenging the validity of the requirements of the permits issued for South Shore and Jones Island. The state agency answered asserting the validity of the permit requirements and filed a counterclaim, alleging that the defendant commissions had violated the permit effluent limitations on numerous occasions. The state agency also alleged

> that under dry weather and wet weather conditions, bypassing and overflowing occur within the sewerage systems of the Commissions and such discharges must either be eliminated or meet secondary treatment standards by July 1, 1977 . . . .

[*Sewerage Commission of the City of Milwaukee and Metropolitan Sewerage Commission of the County of Milwaukee v. State of Wisconsin Department of Natural*

Resources, Stipulation 3 (Wis. Ct. Ct. Case No. 152-342, May 25, 1977), D.Ex. 1311.]

The state court suit was resolved by a settlement agreement, approved by the court on May 25, 1977, in which the sewerage commissions accepted the requirement that they eliminate *dry weather* bypasses and overflows on the Main Interceptor System by July 1, 1982 [*Id.* at 4], and complete construction of relief sewers by July 1, 1983 [*Id.* at 7, 8]. While construction of relief sewers and the other construction contemplated in the agreement presumably is intended to mitigate overflows, there is no specific date by which *wet weather* overflows must be eliminated. The sewerage commissions also agreed to "coordinate" a district-wide effort to "correct" wet weather bypassing and overflows on the separate sewer systems of the municipalities located within the Metropolitan Sewerage District of the County of Milwaukee, *see* note 33, *supra*. Under the agreement, any of the 26 municipalities within the district, by adopting a "resolution of commitment to the correction of wet weather related bypassing and overflowing within its sewerage system" becomes subject to the supervision of the commissions, which are required to make sure that all "corrective work" is complete by July 1, 1986. [*Id.* at 8-9, 15.] We need not decide whether modification of discharge permits in this manner complies with the procedural requirements of §§ 402(b)(3), (5), (6) or the substantive requirements of §§ 402(b)(1)(A), (B). For our purposes, it is sufficient that the state agency has condemned raw sewage discharges.

It is doubtful whether anyone, layman or expert, would argue that the discharge of raw sewage into public waters is a satisfactory alternative to collection and treatment of sewage, even though it may be conceded that it may take time to fund and provide collection and treatment facilities, and therefore the raw sewage discharges may have to be endured for the short term. Donald Wieland, Director of Engineering for the Sewerage Commission of the City of Milwaukee, flatly stated that discharging raw sewage into public waters as a permanent solution to sewage overloads was not "sound sanitary engineering practice":

Q. As a design engineer responsible for designing sewers with adequate hydraulic capacity, do you consider it sound sanitary engineering practice to design and install overflow devices which are intended to permit the discharge of raw sewage as a permanent solution to hydraulic overloads on an interceptor system?

A. Certainly not.

[Tr. 201.] Similarly, Dale Lundy, a hydraulic and sanitary engineering consultant called by plaintiffs, testified that collection and treatment is "considered preferable" to discharge of raw sewage. [Tr. 907.] Defendants point to nothing in the record that would even suggest that the discharge of raw sewage into public waters is either an acceptable long range solution to the problem of disposing of human wastes or a practice that can be regarded as safe.

The "crossover" overflow devices on the city's so-called "separate" system also fall within this aspect of the court's order. Rather than discharging raw sewage directly into public waters, the crossover devices dump the sewage into storm sewers which in turn dump it into the public waters. There may or may not be water in the storm sewers when the crossover devices are activated, and therefore the crossover overflow devices may result in discharges of raw sewage into public waters in precisely the same manner as the overflow devices that dump sewage directly into public waters.[42] We note that the discharge permit apparently issued to the City of Milwaukee by the Wisconsin agency, as modified, *see* note 33, *supra*, requires the city to "initiate a program leading to the elimination of the sanitary sewer crossovers (gravity) and the electrically operated relief pumps" on the city's "separate" sanitary sewer system "to assure attainment of all applicable Water Quality Standards." [Modification of Wisconsin Pollutant Discharge Permit No. WI-0026875, p.1 of 8 (December 17, 1976), D.Ex. 1110.]

[42] As to the significance of any dilution that might occur in the storm sewers *see* the discussion of combined sewer overflows, *infra*.

We have seen that, depending on the efficiency of the treatment, even effluent from a treatment plant may contain pathogens that pose a danger to Illinois residents and phosphorus that contributes to the accelerated eutrophication of the lake. Obviously then untreated sewage poses a greater danger. We therefore affirm the district court's order to the extent that it requires defendants to eliminate discharges of untreated sewage outside the combined sewer system area.

2. *Overflows Within the Combined Sewer Area*

In considering the city's combined sewer overflows, it is again appropriate to take as a starting point the provisions of the Act. Although there is no provision expressly prohibiting "combined sewer overflows," we think that such a prohibition can be inferred from the general provisions of § 301. For, as noted above, it simply does not make sense to read the statute as authorizing unrestricted discharges of untreated sewage; "dilution" by storm water does not constitute treatment. It seems apparent that the amount of dilution that has taken place when an overflow occurs depends entirely on what the relative volumes of sewage and water in the sewer happen to be at the time of the overflow. The overflow mechanisms do not regulate the amount of dilution or distinguish between pure and diluted sewage. If the total amount of sewage and water introduced into a sewer exceeds its capacity, the excess is discharged into the rivers and the lake; it may be either "diluted" or "undiluted." That the flow from the combined sewers is supposed to go to the treatment plants suggests that not even the city believes that the dilution in the combined sewers is sufficient to render the discharges harmless.[43]

EPA regulations concerning treatment plants that receive sewage from combined sewers recognize that

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[43] *See also* the expression of concern about combined sewer overflows in the Senate committee report accompanying the 1977 amendments, quoted *supra; see generally* the definition of treatment works, including "waste in combined storm water . . . sewer systems." § 212, quoted *supra*, note 13.

during wet weather it may be difficult for a treatment plant to meet secondary treatment effluent limitations, but those treatment plants are not exempt from the requirements of the regulations, and "diluted" sewage, like raw sewage, must be treated before being discharged:

> Secondary treatment may not be capable of meeting the percentage removal requirements . . . during wet weather in treatment works which receive flows from combined sewers (sewers which are designed to transport both storm water and sanitary sewage). For such treatment works, the decision must be made on a case-by-case basis as to whether any attainable percentage removal level can be defined, and if so, what that level should be.

40 C.F.R. § 133.03(a). Implicit is a recognition that dilution alone is inadequate to protect the receiving waters.

The discharge permit that appears to have been issued to the City of Milwaukee required the city to "initiate a program leading to the attainment of control of overflows from the City's combined sewer system . . . to assure attainment of all applicable Water Quality Standards." [Modification of Permit No. WI-0026875, *supra*, at p.5 of 8.] Although the City of Milwaukee was not one of the named plaintiffs in the state court litigation referred to above, the settlement agreement appears to modify this provision and to contemplate "completion of construction [on the combined sewer system] and achievement of applicable water quality standards by July 1, 1993." [*See* Stipulation, *supra*, at 10.] Again we need not decide whether a modification accomplished in this way meets the procedural requirements of the Act or whether the terms of the modification meet the substantive requirements of the Act. It is enough that neither Congress nor any agency charged with responsibility under the Act has approved the practice of discharging untreated sewage from a combined sewer system into public waters.

The requirements in the district court's order that the defendants collect and treat the sewage in combined

sewers before discharging it directly or indirectly into Lake Michigan is proper in light of the evidence. Defendants concede the feasibility of the completion date requirements. [App. at 16.]

3. *Illinois' Regulation of Overflows Within Its Own Jurisdiction*

Defendants attack the overflow elimination provision of the district court's order on the additional ground that Illinois does not even require elimination of sewage overflows within its own jurisdiction. Defendants cite § 602 of the Illinois Pollution Control Board Rules and Regulations, Chapter 3: Water Pollution [P.Ex. 171]. There is precedent, in a case of this kind, for considering the rules of the complaining state as an indication of what is appropriate for the protection of the residents of that state. *Missouri v. Illinois, supra*, 200 U.S. at 525-526.[44] The argument is, on its face, inapplicable to sanitary sewer overflows since Illinois does prohibit those. Illinois Pollution Control Board Rules and Regulations, *supra*, § 602(b) (1976) [P.Ex. 171];[45]

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[44] "Where, as here, the plaintiff has sovereign powers, and deliberately permits discharges similar to those of which it complains, it not only offers a standard to which the defendant has the right to appeal, but, as some of those discharges are . . . [at points where they could cause the injury complained of], it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it, that courts should not be curious to apportion the blame." 200 U.S. at 525-526.

[45] Defendants point to one place in Illinois where sewage that has not been fully treated may be discharged into Lake Michigan, *viz.*, Waukegan. At present about twice a year and "ultimately about once a year" some sewage that has only received treatment consisting of 10 hours of sedimentation and chlorination will be discharged into Lake Michigan. [Tr. 13444-13445.] This discharge appears to be in violation of Illinois water pollution regulations, see Reply Memorandum of Plaintiff-Appellee State of Illinois 35, and therefore provides little support for defendants' contention.

consequently, we interpret defendants' argument to be that it was improper to order collection and treatment of sewage in the combined sewer system area.

Section 602(c) does not prohibit combined sewer overflows, but "all dry weather flows, and the first blush of storm flows" must meet applicable effluent limitations, which for Lake Michigan are comparable to those imposed by the district court, and new combined sewers are prohibited. *Id.*, § 602(c)(1).[46] Combined sewer flows equal to ten times the average "dry weather flow" must receive "primary treatment and disinfection with adequate retention time." *Id.*, § 602(c)(2). These requirements seem to be comparable to the treatment of overflows from the collection and conveyance system prescribed by the district court. The Illinois regulations further provide that if necessary to prevent sludge accumulation or oxygen level depression, flows greater than ten times the average "dry weather flow" must be treated by "retention and return to the treatment works or otherwise." *Id.*, § 602(c)(3). Thus, it appears that defendants' only complaint based on a comparison with the Illinois regulations relates to the size of the retention facility required by the court.

The details of the relief to be granted are in large part matters left to the trial court's discretion; in any event, the defendants do not provide us with evidence sufficient to justify disagreement with what the court found necessary or evidence sufficient to show that the marginal increase in cost of building a facility of the size required by the district court is significantly greater than the cost of building a facility of the size presumably contemplated by defendants. Furthermore, although Illinois permits some combined sewer overflows, it also, unlike the defendants, requires some treatment. The trial court is not limited by the law of the complaining state with respect to each detail of the relief to be granted.

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[46] The Illinois Pollution Control Board Rules and Regulations require all effluents discharged into Lake Michigan to meet a 5 mg/liter suspended solids standard and a 4 mg/liter BOD_5 standard. Ill. Pollution Control Board Regulations, *supra*, § 404(d) [P.Ex. 171].

C. *Effluent Limitations*

Neither the minimum effluent limitations prescribed by EPA pursuant to the provisions of the Act nor the effluent limitations imposed by the Wisconsin agency under the National Pollutant Discharge Elimination System limit a federal court's authority to require compliance with more stringent limitations under the federal common law. Nevertheless, those standards provide guidelines which a court should not ignore.

EPA regulations define "secondary treatment" in terms of resulting effluent quality, in part, as follows:

> (a) *Biochemical Oxygen Demand (five-day).* (1) The arithmetic mean of the values for effluent samples collected in a period of 30 consecutive days shall not exceed 30 milligrams per liter.
>
> (2) The arithmetic mean of the values for effluent samples collected in a period of 7 consecutive days shall not exceed 45 milligrams per liter.
>
> (3) The arithmetic mean of the values for effluent samples collected in a period of 30 consecutive days shall not exceed 15 percent of the arithmetic mean of the values for influent samples collected at approximately the same times during the same period (85 percent removal).
>
> (b) *Suspended Solids.* (1) The arithmetic mean of the values for effluent samples collected in a period of 30 consecutive days shall not exceed 30 milligrams per liter.
>
> (2) The arithmetic mean of the values for effluent samples collected in a period of 7 consecutive days shall not exceed 45 milligrams per liter.
>
> (3) The arithmetic mean of the values for effluent samples collected in a period of 30 consecutive days shall not exceed 15 percent of the arithmetic mean of the values for influent samples collected at approximately the same times during the same period (85 percent removal).

40 C.F.R. § 133.102. As noted above, for publicly owned treatment works the Act requires no more than secon-

dary treatment until July 1, 1983, when they must implement the "best practicable waste treatment over the life of the [treatment] works." § 201(g)(2)(A); *see* § 301(b)(2)(B). While point sources must comply with any more stringent requirements of the states in which they are located, Wisconsin does not appear to have adopted any more stringent limitations; the discharge permits issued to the defendants in this case do not impose any more stringent limitations than those in EPA's regulations.

Both the South Shore and Jones Island plants must meet the following conditions under their discharge permits:

> (1) based on daily samples, a monthly average of 30mg/l BOD_5 and a weekly average of 45mg/l BOD_5, provided that neither the monthly nor the weekly average ever exceed 15% of the average BOD_5 content of the influent during the same period (85% removal);
>
> (2) based on daily samples, a monthly average of 30mg/l suspended solids and a weekly average of 45 mg/l suspended solids, provided that neither the monthly nor the weekly average ever exceed 15% of the average suspended solids content of the influent during the same period (85% removal);
>
> (3) based on twice weekly "grab samples," a monthly average fecal coliform count of 200/100ml and a weekly average fecal coliform count of 400/100ml;
>
> (4) based on daily samples, a monthly average of 1mg/l phosphorus; and
>
> (5) monitoring of both total residual chlorine and available "free" chlorine in the effluent, but no specific requirements.

[Permit No. WI-0024775 (South Shore) P.Ex. 63; Permit No. WI-0024767 (Jones Island) P.Ex. 62.] All of the effluent limitations imposed by the district court, except the phosphorus limitation, are significantly more stringent than those prescribed by EPA or in the discharge permits: in lieu of 30mg/l BOD_5 and suspended solids, the district court requires 5mg/l; in lieu of 200 fecal coliform cells per 100ml, the district court requires

40/100ml; in lieu of the monitoring requirement for chlorine, the district court requires a free chlorine residual 15 minutes after exposure. Further, as to BOD_5 and suspended solids, the district court imposes an absolute maximum of 10mg/l instead of the variable 85% removal requirement in the EPA regulations and the discharge permits.

These effluent limitations imposed by the district court all relate to the hazard presented to Illinois residents by Milwaukee's discharge of sewage containing pathogens. Although aware that these limitations could be consistently met only by constructing what are referred to as "advanced waste treatment" plants, the court found that such treatment was necessary to protect Illinois residents from the danger presented by Milwaukee's discharges. [Tr. 14248-14249.] We are unable to conclude, after a careful examination of the evidence cited by plaintiffs to justify the limitations imposed, that this evidence was sufficient.

We recognize that once liability has been established, a trial court has broad authority to fashion appropriate relief. This rule is particularly applicable in an area of law where the appropriate relief will invariably depend on the circumstances of each case. *See, e.g., Washington v. General Motors Corp.*, 406 U.S. 109, 115-116 (1972). Nevertheless, a court, unlike a legislature or an administrative agency, is not free to rest solely upon what it thinks desirable; there must be evidence to support its conclusion that the relief granted is necessary to protect the complaining party from harm.[47]

To support the 5 mg/l BOD_5 and suspended solids limitations imposed by the district court, Illinois relies on the testimony of one witness who asserted that even at 30 mg/l suspended solids "you are going to have a lot of organics tied up with solids that is going to use up your

[47] *Cf. Milliken v. Bradley*, 433 U.S. 267, 280 (1977) ("[L]ike other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation . . . . The remedy must therefore be related to 'the condition alleged to offend the Constitution . . . .' ").

chlorine, and that the chlorine can't even get into." Further, Illinois cites the general testimony that organic matter and suspended solids interfere with effective chlorination and therefore should be reduced as much as possible. Illinois also relies on the testimony of one witness that the kind of treatment required to meet the 5 mg/l standard is preferable to the kind of treatment now used by the defendants. And finally, Illinois points to evidence that one of the defendants' consultant sanitary engineers recommended treatment comparable to that required to meet the 5 mg/l standard, that three cities have been required to meet similar limitations, and that several cities have voluntarily decided to modify their own treatment facilities in ways similar to that which would be required under the district court's order.[48]

The evidence shows that suspended solids and organic matter interfere with chlorination, and therefore that there is some correlation between suspended solids and BOD_5 and effective chlorination. The evidence does not, however, show how much more effective chlorination would be a 5mg/l suspended solids and BOD_5 than at 30mg/l suspended solids and BOD_5; the difference may be significant or it may be *de minimis*.[49] [Compare Tr. 12398-12400 with Tr. 13399-13400.]

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[48] We only summarize the evidence in this opinion; the evidence relied on by Illinois is discussed in detail in the unpublished order filed with this opinion. *See* note 31, *supra*.

[49] Wellings testified that tests had failed to demonstrate any viruses in effluent containing only 5 Jackson Turbidity Units per liter. [Tr. 12399.] But Wellings' work focused primarily on the virus content of effluent from treatment facilities and not on removal efficiencies. [Tr. 13399.] For the purpose of determining whether significant benefits will result from reducing solids and BOD_5 from 30 mg/l to 5 mg/l, it is not enough to know that tests have shown viruses in effluent from a plant designed to meet the 30 mg/l standard and similar tests have failed to show viruses in a plant designed to meet the 5 mg/l standard. Nor is it enough to take random influent samples and random effluent samples, for the virus content of the sewage necessarily varies. Virus content in the influent may be much more significant than the particular solids or

(Footnote continued on following page)

That a few cities have adopted the more stringent standards is hardly enough to prove that those standards are necessary here, especially when the persons to be protected are many miles down the lakeshore from the discharge points. *Cf.* Comptroller General of the United States, "Report to Congress: Better Data Collection and Planning is Needed to Justify Advanced Waste Treatment Construction" (1976) [D.Ex. 1105] (pointing out that several cities began construction of advanced waste treatment facilities without adequate consideration of the expected costs and benefits of such facilities).

Our difficulty with the evidence reviewed above is that it consists merely of conclusions of the experts and does not explain why the particular standards are necessary to protect the health of Illinois residents.[50] We are asked to accept the conclusions on faith. It is difficult for us to see how the opinion of an expert can be intelligently appraised unless it is supported by reasons.

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[49] *continued*
BOD_5 level the plant is designed to achieve. Furthermore, the flow rates at the time the tests are conducted are important, for it is virtually meaningless to say that a plant designed to meet the 5 mg/l standard performs better than an overloaded plant designed to meet the 30 mg/l standard. [*See* Tr. 12377-12378 (Wellings).]

[50] While Wellings, who comes the closest to providing evidentiary support for the suspended solids limitations the court imposed, testified that "the problem with 30 milligrams per liter is you are going to have a lot of organics tied up with solids that is going to use up your chlorine, and the chlorine can't even get into," and there would "still" be "a problem with disinfection," she did not say the same would be true of any figure between thirty and five. She went on to say that she did not "know how she would equate Jackson Turbidity Units [on which her relevant experience was based] with milligrams, . . . because you would have to know size, shape and all that, source, because of the test itself," and then said 5 mg/l "would be well in the ball park," and she "wouldn't want any more than five." This is a speculative and uncertain basis for the court's implied conclusion that effluent limitations specifically adopted by EPA and the Wisconsin agency are insufficient to protect the health of people more than 25 miles from the discharge points. *See also* note 49, *supra*.

This is especially so when the opinion is offered to support effluent limitations markedly lower than (a) those established by EPA in its regulations, (b) those established by the state permit authority with the duty of protecting residents in the immediate environs of the discharges, and (c) those established by the complaining state itself for waters other than Lake Michigan.[51] The record is conspicuously silent as to the reasons these less stringent standards were found adequate to protect persons in the immediate environs of the discharges by experts who were presumably as dedicated to the protection of public health and the environment as those on whose conclusions plaintiffs rely, and why those reasons are inapplicable here, especially when the discharges occur at least 25 miles from any of the persons to be protected. In short, plaintiffs point to nothing in the record, and we have found nothing, to connect the effluent limitations imposed by the district court with the protection of Illinois residents. If enforcement of the limitations imposed in the discharge permits proves inadequate to protect Illinois residents, then more stringent limitations may become necessary. But on the record before us, we cannot sustain the district court's order in this respect.[52]

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[51] Illinois Pollution Control Board Rules and Regulations, *supra*, § 404 [P.Ex. 171].

[52] In the statement of facts contained in Illinois' first brief we were told: "Not only does sewage provide the basic element of phosphorus [which is necessary for eutrophication], but also it contains a whole series of nutrients . . . 'a very rich nutrient broth' for aquatic plant growth (Tr. 2889)." Illinois does not, however, attempt to sustain the effluent limitations imposed by the district court on this basis. Indeed, it is not even clear that this "fact" is relevant to the effluent limitations. There does not appear to be any evidence as to the relative "nutrient" content of effluent from treatment works designed to meet the 30 mg/l suspended solids and BOD_5 standards and those designed to meet the 5 mg/l standards. Presumably, the nutrient content of effluent from a plant meeting the 5 mg/l standards is lower than that of a plant meeting the 30 mg/l standards. But whether the difference is significant with respect to eutrophication of Lake Michigan is not clear.

Also relevant to this aspect of the remedy is Congress' treatment of publicly-owned treatment facilities in the 1972 and 1977 amendments to FWPCA. Secondary treatment facilities, which are not capable of meeting the 5 mg/l limitations, are permitted under 33 U.S.C. § 301(b)(1)(B) until July 1, 1983, when "the best practicable waste treatment over the life of the works" becomes the requirement. Although Congress did not attempt to answer the public health questions, leaving them to EPA and state agencies acting under EPA's supervision, the provisions of the Act are at least an indication of Congressional reluctance to risk pushing municipalities beyond the limits of their resources. The 1977 amendments, summarized above, show a deepening concern on this score. Congress' position in the Act does not, as we have held, mark the limits of our power in this common law nuisance action, but the policy underlying that position, to which we should give some deference, is at least a reason not to allow the nature of the action to cause a relaxation of the requirements of evidentiary foundation that would normally be observed in other kinds of actions.[53]

It is not clear whether the fecal coliform limitation and the free chlorine residual requirement imposed by the district court can be met with secondary treatment. In any event, the record support for these limitations is as deficient as it is for the suspended solid and BOD_5 limitations, and we are provided with no explanation of why such limitations were not included in the NPDES permits for the plants and the federal regulations.[54]

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[53] Plaintiff also relies on Illinois statutory and common law. The district court indicated that under any of the asserted grounds for relief the result would be the same. [App. 20-21.] But it is federal common law and not state statutory or common law that controls in this case, *Illinois v. Milwaukee*, *supra*, 406 U.S. at 107 & n. 9, and therefore we do not address the state law claims.

[54] In addition we note that Illinois' general effluent standard fecal coliform limitation is 400/100 ml. *See* Illinois Pollution Control Board Rules and Regulations, *supra*, § 405 [P.Ex. 171]. The "water quality" fecal coliform limitation for Lake

(Footnote continued on following page)

Our treatment of the effluent limitations imposed in the district court's order is not inconsistent with our treatment of the overflow requirements of the order. First, and we think most important, the evidence presented supports the district court's finding that the defendants' discharges of raw sewage, whether diluted or not, pose a significant risk of injury to Illinois residents. Raw sewage contains vastly higher concentrations of pathogens than treated sewage. Millions of gallons of raw sewage are dumped into the water each year from the 239 overflow points on the defendants' sewage systems, most frequently during wet weather, but also during dry weather. Lake currents can and do sometimes carry the pathogens into Illinois waters close to shore.

Second, no one even attempts to justify such discharges as harmless or insignificant. As we have said, it is arguable that the Act itself prohibits discharges of raw sewage. The Wisconsin agency has taken steps to eliminate some overflows and to "correct" others although giving the defendants a longer time to take the necessary action than did the district court. But as stated above the defendants have conceded that compliance with the deadlines imposed by the court is feasible.

On the other hand, the evidence supporting the effluent limitations is weak, at best. They are more stringent than those required by Congress, EPA, and the Wisconsin discharge permit issuing agency. And there is no evidence as to why the limitations deemed adequate to protect the inhabitants in the vicinity of the discharges are inadequate to protect the residents of Illinois who are at least 25 miles away.

The phosphorus limitation imposed by the district court can be achieved using secondary treatment; an

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[54] *continued*
Michigan is 20/100 ml. Ill. Pollution Control Board Rules and Regs., *supra*, § 206(d) [P.Ex. 171]. For the effect of a more stringent water quality limitation than effluent limitation *see id.* § 201(a) [P.Ex. 171]. There does not appear to be any effluent limitation specifically requiring a chlorine residual, either "free" or total.

identical limitation is prescribed in the defendants' discharge permits.[55]

We affirm the district court's order to the extent that it requires the elimination of all sewage overflows and imposes a 1 mg/l phosphorus effluent limitation. We reverse the court's order insofar as it imposes suspended solids, BOD_5, fecal coliform, and free chlorine residual effluent limitations more stringent than those prescribed in defendants' discharge permits. The case is remanded to the district court with directions to modify the injunctive order in conformity with the rulings of this court.

AFFIRMED IN PART,
REVERSED AND REMANDED IN PART.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[55] Illinois' phosphorus effluent standard is 1 mg/l; its water quality standard for Lake Michigan is .007 mg/l. *See* Illinois Pollution Control Board Rules and Regulations, *supra*, §§ 407, 206(c) [P.Ex. 171].

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

ARGUED: May 24, 1978
SUBMITTED: October 12, 1978
April 26, 1979.

Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. ROY W. HARPER, Senior District Judge*

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

and

PEOPLE OF THE STATE OF MICHIGAN,
Intervening Plaintiff-Appellee,

No. 77-2246 vs.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Defendant-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern District

No. 72-C-1253
John F. Grady, *Judge*

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* The Honorable Roy W. Harper, Senior District Judge for the Eastern and Western Districts of Missouri, is sitting by designation.

ORDER

This order supplements our published opinion and should be read in connection with that opinion; the order is not complete in itself. Since the subjects of this order are only the evidentiary support for the district court's findings of fact and the evidence relied on by Illinois to support the 5 mg/1 BOD_5 and suspended solids effluent limitations, they do not meet the criteria for publication stated in Circuit Rule 35.

I.

Sufficiency of the Evidence Supporting Findings of Fact

A. Discharges of Sewage Containing Pathogens

The District Court found that the defendants dump significant amounts of sewage containing pathogens into Lake Michigan. [Tr. 14214.] Milwaukee cannot seriously contend that the evidence was insufficient to support this finding.

1. Discharges of Raw Sewage

In its Wisconsin Pollutant Discharge Elimination System permit applications for the Jones Island Sewage Disposal Plant (Jones Island plant) and the South Shore Waste Water Treatment Plant (South Shore plant), both dated November 7, 1973, the City Commission listed 18 bypass points and 31 overflow points on the Metropolitan (or Main) Interceptor System from which untreated sewage would flow directly or indirectly into Lake Michigan and rivers that flow into the lake. [Plaintiff's Exhibits (P.Ex.) 62 and 63.] The discharge permits issued for the plants require the commission to submit quarterly reports showing the discharges from selected overflow points. [P.Ex. 62 (Jones Island plant: Permit No. WI-0024767, Part II. D.6, d.); P.Ex. 63 (South Part II. D.6, d.); P.Ex. 63 (South Shore plant: Permit No. WI-0024775, Part II. E.7, c.).] The commission's report for the first quarter of 1976 indicates that in March the discharges from just 11 overflow points was 646.46 million gallons of untreated sewage. [P.Ex. 56; see P.Ex. 55 (2d

quarter 1976 discharge report).] At trial, Donald Wieland, Director of Engineering for the Commission, testified that "diluted," but untreated, sewage flowed from the overflow points into Lake Michigan and Milwaukee rivers.

The City of Milwaukee's local sewer system[1] consists of two parts: (1) a so-called "separate sewer system," which carries only sewage to the Metropolitan Interceptor System, and (2) a "combined sewer system," which carries storm water and sewage to the Metropolitan Interceptor System. [Tr. 384; 386-387; 390-391; 426-428.] The separate sewer system has 78 overflow points (called "crossovers") at which the raw sewage flows into the city's storm sewers and then into either Lake Michigan or rivers that flow into the lake. [Tr. 428; 437-438; 448-449.] An additional 112 overflow points are built into the combined sewer system (called combined sewer overflows or "CSO overflows") at points where the combined sewer system connects with the Metropolitan Interceptor System. [Tr. 153-157; 386-387.] If the flow from the combined sewer is greater than the Metropolitan System can accommodate at the overflow point, the storm water and raw sewage are discharged into rivers that flow into Lake Michigan. [Tr. 153-155; 386-387.]

Most of the overflow points are either pumping stations or what are called "gravity overflows." [Tr. 134-135; 398; 442-444; 448-451.] "These pumping stations are installations of pumps that are activated by electrodes so that when the water level in a sewer system gets to a certain point ... the pumps will automatically start operating and discharge the flow into a storm sewer [which empties into a river that flows into the lake] or directly to a water course [that flows into the lake]." [Tr. 134.] At the gravity overflows, "[w]hen the sewage reaches a certain level in the ... sewer system, it reaches a bypass pipe, and runs off into, again, either a storm sewer or the surface waters." [Tr. 134-135; see 230-232.] Because these overflow points are

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[1] Although the City apparently received a discharge permit covering these sewers, the only evidence of that permit we find in the record is a modification. [D. Ex. 1110; *see also* Tr. 156.]

triggered by the level of sewage, a blockage in the sewers that causes the sewage level to rise will activate the pumps or cause the sewage to flow through the pipes that lead into the water or storm sewers, even if the sewer capacity would otherwise be adequate. In some places on the Metropolitan Interceptor System, pipes of large diameter are connected to pipes of a smaller diameter, which causes an overflow whenever the larger pipe carries an amount exceeding the capacity of the smaller pipe. [Tr. 139-140; 333-334.] Ground water and water from the storm sewers sometimes "infiltrates" or flows into the sanitary sewers, increasing the liquid flow [Tr. 148, 152], and therefore during wet weather overflows are especially likely.

In addition, the City of Milwaukee and its Sewerage Commission operate two "flushing tunnels" that clean the Milwaukee and Kinnickinnic Rivers by pumping water from Lake Michigan to upstream points in the two rivers and letting the water flow back into the lake. The purpose and effect of this flushing are to increase the flow of the two rivers and thereby wash any sewage deposited in the rivers down into Lake Michigan. [Tr. 379-383; P.Ex. 162 (Kinnickinnic River).]

2. Discharges of Inadequately Treated Sewage

The district court also found that because sewage is often inadequately treated at both the Jones Island plant and the South Shore plant, the effluent from those plants also sometimes contains pathogens.[2] [Tr. 14214.] Effluent from the Jones Island plant is discharged into the Milwaukee Harbor, and flows from there into Lake Michigan. Effluent from the South Shore plant is discharged directly into the lake.

In evaluating the performance of the two plants, the district court relied on two indicators: (1) five day biochemical oxygen demand of the effluent (BOD_5), and (2) suspended solids remaining in the effluent. [Tr. 14214-14215.]

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[2] The evidence supporting the court's finding that sewage contains disease causing viruses and bacteria is discussed below.

BOD_5 and suspended solids are generally recognized to be significant factors for evaluating the degree of pollution in water. *See, e.g.*, Sawyer, "Activated Sludge Modifications", 32 *Jl. W.P.C. Fed.* 232, 235-241 (1960) [Defendant's Exhibit (D.Ex.) 1208]. Every applicant for an NPDES permit under the Act must submit data showing the BOD_5 and the suspended solids content of the applicant's discharges. [*E.g.*, P.Ex. 62 (EPA, National Pollutant Discharge Elimination System: Application for Permit to Discharge Wastewater, Standard Form A — Municipal, question 14).]

BOD_5 and suspended solids are particularly significant indicators of plant performance when the issue is whether the effluent contains significant numbers of viruses or bacteria. BOD_5 is an indirect measure of the biodegradable organics in the effluent. See *Standard Methods for the Examination of Water and Wastewater*, 513, 544 (14th ed. 1975). Chlorine, contained in hypochlorous acid, is the only disinfectant used at either the Jones Island plant or the South Shore plant. [P.Ex. 62, 63.] Ammonia or nitrogen in organic material will react with chlorine to form compounds that are either ineffective, or less effective than hypochlorous acid as viricides and bactericides. [Tr. 12064-12067, 3083-3084, 3086, 2204-2205.] *See* Sproul, "Removal of Viruses by Treatment Processes," in Berg, et al. (ed.), *Viruses in Water* 167, 173-175 (1976) [P.Ex 140]. A relatively high BOD_5 implies the presence of a significant amount of organic material, which will render chlorine either ineffective or less effective as a viricide and bactericide. Suspended solids, either organic or inorganic, may contain significant numbers of viruses and bacteria. [Tr. 12067-12071, 12,378, 12,398, 3083-3084, 2205.] Even chlorine not rendered less effective by the presence of organic material cannot "penetrate very far" into suspended solids to "kill embedded virus." [Tr. 12067-12068; *see id.* 12,398.] Thus, a large amount of BOD_5 and suspended solids in the effluent indicates that any chlorine added to the sewage entering the treatment plant will be ineffective or less effective, thereby increasing the likelihood that disease causing viruses or bacteria in the influent remain in the effluent. [See Tr. 12398, 12401-12402, 3083-3085.]

Under the discharge permit issued by the Wisconsin Department of Natural Resources for the Jones Island and South Shore plants, the average daily BOD_5 and suspended solids content of the effluent may not exceed 30 miligrams per liter (mg/l) in any 30-day period. [P.Ex. 62 (Permit No. WI-0024767, Part II, "Daily Effluent Limitations"); P.Ex. 63] EPA regulations adopted pursuant to the Act established the same maximum levels for BOD_5 and suspended solids. 40 C.F.R. §133.102 (a),(b).

There are two respects in which the operation of the plants was shown to have resulted in the discharge of inadequately treated sewage into the lake. First, the permits' 30-day average limitations of 30 mg/l have sometimes been violated by the plants.[3] Second, whether or not the 30-day average limitations were met, discharges on individual days were greatly in excess of the permissible monthly average of 30 mg/l per day.[4]

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[3] The Jones Island plant failed to meet the suspended solids limitation in each of the first three months of 1974. In 1975 that plant failed to meet the BOD_5 limitation in five months and the suspended solids limitation in eight months. In 1976 the plant met the BOD_5 limitation in 12 months but the suspended solids limitation in only six months. [P. Ex. 123, 125.]

Similar violations of the permit limitations for the South Shore plant appear in the records for 1975 (BOD_5 limitation met in only five months; suspended solids once) and 1976 (BOD_5 limitations met in seven of 11 months recorded but suspended solids in only two of those months). [P. Ex. 92, 93, 94.]

[4] In 1974, while meeting the 30-day average for BOD_5 in all periods, the Jones Island plant ran as high as 98 mg/l on one day. The high for an individual day's suspended solids count that year was 329 mg/l. [P. Ex. 125.] In 1976 the plant recorded a BOD_5 count as high as 170 mg/l and a suspended solids count as high as 392 mg/l for individual days. [P. Ex. 123, 125.] In the first four months of 1977, Jones Island recorded a BOD_5 count as high as 100 mg/l and suspended solids counts as high as 388 and 237 mg/l. [D. Ex 1302, 1303.]

(Footnote continued on following page)

An expert called by plaintiffs who had studied the virus content of effluents from several sewage treatment plants in Florida [Tr. 12291-12293], Flora Wellings, Director of the Epidemiology Research Center in Tampa, Florida, testified that if the suspended solids content of the effluent was 199 mg/1, a count frequently exceeded on a daily basis by both plants, "You are still going to have a lot of virus coming through...." and chlorination would not be effective. [Tr. at 12397.] Dr. Wellings characterized 15-30 mg/1 of suspended solids as "very low." [Tr. 13349-13350.] But she also pointed out that even at 30 mg/1 there would be a "lot of organics," which would either combine with the chlorine rendering it a less effective viricide or protect embedded viruses from any chlorine at all. [Tr. 12398.] In light of the operating reports from Jones Island and South Shore reviewed above, it is apparent that if Milwaukee's sewage contains pathogens, some of them are likely to survive the treat-

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Footnote 4 (continued)

The South Shore plant experienced similar problems. In 1975, its highest BOD_5 count for an individual day was 372 mg/1 and its highest suspended solids count 1,115 mg/1. [P. Ex. 92.] In 1976 on individual days the plant's BOD_5 count exceeded 300 mg/1 and its suspended solids count reached 340 mg/1. [P. Ex. 93, 94.]

In comments to a monthly report during a four month period in which the Jones Island plant never met the suspended solids limitation, the plant managers said,

> The average effluent suspended solids concentration in excess of the 30 mg/1 limitation are due to the continued inability to remove solids as they are generated. Ideally, the mixed liquor suspended solids should be in the range of 2000 mg/1 to 3000 mg/1 with present plant loadings. During the month of February, the mixed liquor suspended solids averaged 4300 mg/1 with a maximum day's average of 4800 mg/1.

[D.Ex. 1302, Comments for the February 1977: WPDES Permit No. WI-0024767, at 1; *see also* comments for March and April, 1977 in D.Ex. 1302.]

ment at these plants and be discharged into Lake Michigan, as the court found.

3. Presence of Pathogens

The evidence established that pathogens are found in the sewage discharges of every urban center, although the record contains no evidence on the subject with respect to Milwaukee in particular.

Joseph Melnick, Professor of Virology and Epidemiology at the Baylor College of Medicine, testified that "every city the size of Milwaukee will have carriers of enteroviruses in the city who will be excreting viruses into the sewage." [Tr. 2206; see *id.* 2174, 2175.] Edwin Geldreich, Director of EPA's Microbiological Treatment Branch in Cincinnati, Ohio [Tr. 3048], testified to the same effect with respect to both viruses and bacteria. [Tr. 3101.] Experts studying enteroviruses in waste water estimate that untreated sewage will contain an average of 7000 infectious virus particles, or plaque forming units, per liter. [Tr. 2184-2185.] *See* Sproul, *supra* at 176 [P.Ex. 140]. Defendants' expert, Dean Cliver, Professor, Food Research Institute and Department of Bacteriology, University of Wisconsin, acknowledged on cross-examination that one gram of feces from an infected person "could contain literally millions of enteric viruses" [Tr. at 10278], *i.e.*, viruses that inhabit the gastroenteric tract of a human being. Many enteric viruses cause diseases in humans, including polio, pleurodynia, myocarditis, meningitis, and encephalitis. [Tr. 2163-2170; see *id.* 2188.] Although plaintiffs did not conduct tests to demonstrate that on a particular day Milwaukee's sewage contained disease-causing viruses, there was evidence that known tests are difficult and ineffective for determining the presence of some such viruses. The omission is not fatal, for the evidence presented adequately supports the court's inference that Milwaukee's sewage contains disease-causing viruses and bacteria.

Although it is possible to test water for the presence of specific pathogenic microorganisms, [Tr. 3099;] *Standard Methods for the Examination of Water and Wastewater,*

954-966 (14th ed. 1975), there are practical difficulties in conducting such tests on a large scale. Therefore, those studying water pollution have generally focused on various "indicator organisms" rather than on the pathogens themselves. *See Standard Methods, supra,* 875, 954-955. [Tr. 3056-3064, 3099-3100.] Fecal coliform is one commonly used "indicator organism." [Tr. 3097-3100.] As the number of fecal coliform present in water increases, so too does the probability that the water will contain pathogenic bacteria. [Tr. 3102-3103.] Geldreich testified that although the relationship between the number of fecal coliform present in a water sample and the number of salmonella, one of the most common bacterial pathogens, has not been established, if in 100 samples there are 1000 fecal coliforms/100 milliliters (ml), then in about 95 of those same samples salmonella will also be found. [See Tr. 3097-3098, 3102.] Geldreich cautioned, however, that negative results cannot be relied on to assure the absence of either pathogenic viruses or pathogenic bacteria. [Tr. 3101; see *id.* 2201; 12083-84.]

The fecal coliform counts in the sewage discharged from the overflow points on defendants' sewage collection system is sometimes as high as 23,000,000 per 100 ml. [P.Ex. 55 (Overflow # 036 Menomonee and North, May 16, 1976; *id.* June 14, 1976); see Tr. 3117-3118.] While warm-blooded animals other than man contribute to the fecal coliform content of Milwaukee's raw sewage discharges [Tr. 3114-3115], their contribution is likely to be relatively minor. It is highly probable that Milwaukee's sewage contains significant numbers of pathogenic viruses and bacteria.

Furthermore, the operating data for both the Jones Island plant and the South Shore plant indicate that the fecal coliform count in the effluent often exceeds 1000/100 ml. In March 1977, the effluent fecal coliform counts at Jones Island exceeded 1,000/100 ml on six of the 14 days measured, with a high of 17,000/100 ml. [D.Ex. 1303, see also P.Ex. 123 (Operating data for 1975).]

For the same reasons pathogenic viruses are likely to survive the treatment at these two plants, pathogenic bacteria are likely

to survive. [See Tr. 3082-3085.] The operating data for the two plants showing high fecal coliform counts in the effluent confirm this conclusion since effective chlorination presumably would also reduce fecal coliform.

B. Transport of Sewage Discharged at Milwaukee to Illinois Waters

The district court found that "bacteria and viruses numbering literally in the millions are transported live and intact from Milwaukee to Illinois waters." [Tr. 14217.] This finding is not clearly erroneous.

Geldreich testified that at temperatures between 5 and 20 degrees centigrade (Celsius), 41 and 68 degrees Fahrenheit, 90% of the total number of bacteria discharged on a given day will die within 2 to 4 days. [Tr. 3092.] There are two factors, however, that may either extend the time during which bacteria discharged on a particular day will affect the receiving body of water or increase the significance of the discharge on a given day: "persistence" and "regrowth." If there are sufficient nutrients "and a set of conditions" in the receiving body of water, then bacteria may "persist" at the original density for a period of 2 to 4 days before beginning to "die-off." [Tr. 3092-3095.] Thus, bacteria may live for a period of 4 to 8 days. [Tr. 3095-3096.] Geldreich testified that "persistence" is likely to occur in improperly treated or untreated sewage. [Tr. 3094-3095.] As the term "regrowth" suggests, bacteria may reproduce after being discharged into a body of water, provided of course that there are sufficient nutrients available. [Tr. 3093-3094.] Geldreich testified that such "regrowth" may result in the production of ten times the original number of bacteria. [*Id.*]

As to the die-off rate for enteric viruses, Melnick testified that at temperatures of 70 degrees Fahrenheit, viruses will survive for approximately two weeks, but at temperatures of 40-50 degrees Fahrenheit, they will survive for "months." [Tr. 2199-2200.] In colder water, viruses may live indefinitely. [*Id.*] If currents along the shore of Lake Michigan from Milwaukee

to Illinois travel at speeds sufficient to reach Illinois in less than 4 to 8 days, then bacteria or viruses discharged at Milwaukee will be carried "live and intact to Illinois waters."

The distance from the center of Milwaukee Harbor, where the Jones Island plant is located, to the Illinois border is about 37 statute miles, about 60 kilometers (km) [Tr. 2379, 2010]; from the South Shore plant the distance is only about 25 statute miles, about 40 km [*See* Tr. 8944-8945]. Captain James Verber, an oceanographer specializing in water transport and water movement, testified that data collected under his supervision between 1962 and 1964 indicate that currents between Milwaukee and Illinois will travel toward the south at speeds sufficient to carry suspended pollutants 40 miles about 12 times each year. [Tr. 2392.] More specific was Verber's testimony that during the period he studied there were six occasions on which the current flowed south for 7.5 days at a rate of about 10 centimeters per second (cm/sec), and therefore covered a distance of about 50 miles. [Tr. 2379-2381.] There were other occasions on which the current traveled about 40 miles in 2.5-4.9 days. [*Id.*] On one occasion the current traveled at a rate of 40-51 cm/sec, covering the distance in about 1.75 days. [*Id.*] Verber testified that the data presented in Sato & Mortimer, "Lake Currents and Temperatures Near the Western Shore of Lake Michigan" [P.Ex. 38], indicate that the frequency of transport from Milwaukee to Illinois might be greater than 12 in some years. [Tr. 2392.] Verber pointed out that the data showed one occasion when the currents from Milwaukee to Illinois persisted for 19 days and during that period at speeds sufficient to cover the 40 miles in less than 4 days. [Tr. 2382.]

Gabriel Csanady, an oceanographer for the Woods Hole Oceanographic Institution, also estimated that currents carrying pollutants would flow from Milwaukee to Illinois for sufficiently long periods of time and at sufficient speeds to cover the 37 miles about 12 times a year. [Tr. 2058-2060.] Csanady testified that currents persisted in one direction on an average of about 4 days, sometimes as long as 7 days and frequently for 1 or 2 days. [Tr. 2011, 2032, 2034.] See Csanady, "Diffusion and Dispersion", Part 2 in 2 *Environmental Status of the Lake Michigan*

Region, 103, 115-116 (1975) [P.Ex. 201]. Csanady also testified that wind driven current speeds of 30 cm/sec or 16 miles per day were "typical" in Lake Michigan, but speeds of 50 cm/sec or 27 miles per day also have been recorded. [Tr. 1950-1952, 2009.] *See* Diffusion and Dispersion, *supra,* at 116 [P. Ex. 20].

Even defendants' experts, Donald Pritchard and Harry Carter, testified that currents between Milwaukee and Illinois flow toward the south for sufficient periods at rates sufficient to carry water from Milwaukee across the Illinois border on an average of four times per year. [Tr. 7168 (Pritchard); 8666-8671 (Carter); see D.Ex. 905 (Table 1); D.Ex. 1163 (Tables 2 and 4).] A table prepared by Carter and headed "Southerly Flows Sufficiently Long and/or Strong to Transport Effluent from Milwaukee to Illinios" [D.Ex. 905, Table 1], shows that in the period studied there were four occasions on which effluent released at Jones Island would have traveled across the Illinois border; the table shows that on these four occasions the effluent would have crossed into Illinois waters after about 4 days, 6 days, 5 days, and 2 days. [D.Ex. 905.] There were at least seven occasions on which effluent released at South Shore would have traveled the shorter distance into Illinois waters. [D.Ex. 1163, Table 4.]

If, as the experts testified, bacteria discharged into Lake Michigan will survive for a period of four to eight days and viruses will survive for a minimum of two weeks and longer in periods of cool temperatures, then currents sufficient to travel the distance between Milwaukee to Illinois in less than four days will carry bacteria and viruses into Illinois waters. Defendants contend, however, that there are four factors that are not accounted for in the die-off rates for bacteria and viruses given by plaintiff's experts: (1) sedimentation, (2) biological inactivation, (3) predation, and (4) ultraviolet radiation. These factors assertedly reduce the number of bacteria or viruses that would survive the trip from Milwaukee to Illinois.

Defendants contend that sedimentation operates to reduce the number of bacteria and viruses that travel to Illinois at several points along the way. First, the Jones Island effluent is

discharged into the Milwuakee Harbor, which allegedly serves as a settling basin. [Tr. 7290-7292, 7304.] The Milwaukee and Menomonee Rivers also flow into the Milwaukee Harbor; therefore, discharges into these rivers from the overflow points on defendants' sewage system are also subject to whatever settling occurs in the rivers or the harbor. [Tr. 5174-5176.] Many of the overflow points, however, discharge into storm sewers or rivers that lead directly to the lake. Some settling may occur in sewers or rivers, but the sewage from South Shore, which is discharged directly into the lake, is, of course, not subject to these settling effects. As to those discharges that are subject to sedimentation in the harbor, and the rivers leading to the harbor, two points seem dispositive. First, plaintiff's introduced evidence [P.Exs. 147 and 148] showing fecal coliform counts at the harbor entrance, where the water flows into Lake Michigan, as high as 32,000 fecal coliform per 100 ml and 37,000 fecal coliform per 100 ml. These counts were taken using the membrane filter test, which may understate the fecal coliform count that would result from using the more sensitive multiple tube test ("most probable number" test) by factors of 10 or 100. [Tr. 3070-3073.]

Second, viruses and bacteria settle out if the particles in which they are embedded or to which they are adsorbed settle. [Tr. 2260, 10244-10245.] Pritchard stated generally that the "processes by which any living organism that drifts with the water ... can disappear" include sedimentation, and that such living organisms are "usually ... attached to other particles which have a density greater than water." [Tr. 7014-7015.] Nevertheless, on cross-examination, William Katz, Director of Planning and Development for the Milwaukee Metropolitan Sewerage District, testified that the specific gravity of fecal material is close to that of water, and therefore would be "one of the last things" to settle out. [Tr. 11400.] The trial court could properly have relied on Katz's testimony rather than Pritchard's, and found sedimentation of viruses and bacteria to be minimal in the harbor, rivers, or sewers.

Defendants also contend that along the path between Milwaukee and Illinois particles settle out taking their adsorbed

viruses and bacteria with them. But, as observed above, if the viruses and bacteria are embedded in or adsorbed to particles with densities less than that of water, sedimentation will be minimal. Since sedimentation in either the harbor or the lake will not kill or deactivate either viruses or bacteria, if they are resuspended by turbulence in the water or rapid currents in rivers or the lake, they may still be carried "live and intact" to Illinois water. [Tr. 10322-10323, 8861-8863.] Although the four to eight day life span of discharged bacteria makes resuspension and transport less significant as to them, viruses may live for months or indefinitely in cold water. Therefore, sedimentation of viruses may be of little, or no, practical significance.[5]

Defendants' argument that "biological inactivation" is not included in the die-off rates testified to by plaintiff's witnesses seems to be erroneous. In the first place, the coliform die-off rates presented in Canale, et al., "Water Quality Models for Total Coliform," 45 *Jl. W.P.C. Fed.* 325, 330-332 (1973), on which plaintiffs' expert Csanady relied [Tr. 2050], and which are cited in evidence presented by defendants [D. Ex. 85 at 73-74], are based on studies in which water from Lake Michigan was used. Any bacteria or algae present in Lake Michigan were also present in the samples; any "biological inactivation" that would take place in Lake Michigan would also occur in the samples. [See Tr. 2300-2301.] Moreover, it is unlikely that such biological inactivation" as may occur [Tr. 10226-10229] is significant. [Tr. 2297-2299.] Melnick testified that although "biological inactivation" may occur, it is much less significant than water temperature as a factor affecting the die-off rate. [Tr. 2297-2299.] Cliver who participated in the study described in Hermann, *et al.*, "Persistence of Enteroviruses in Lake Water," *Applied Microbiology* 895 (1974) [D.Ex. 38], testified that viruses injected into sterilized water from Lake Wingra in Madison, Wisconsin, lived longer than similar viruses injected into unsterilized lake water in a dialysis bag that was placed back into the lake. [Tr. 10227-10229.] Relying on that evidence

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[5] Any viruses or bacteria embedded in or adsorbed to organic material that does settle to the bottom may be eaten by macrobenthic organisms. See discussion of "predation", *infra.*

and data collected in an earlier study, Cliver and his colleagues suggested that proteolytic enzymes produced by bacteria and other organisms in Lake Wingra accelerate deactivation of some types of viruses. *See* "Persistence of Enteroviruses," *supra,* at 895 [D.Ex. 38.]. Assuming that bacteria or other organisms that produce proteolytic enzymes do exist in Lake Michigan, that fact does not substantially undermine the conclusion that the discharges at Milwaukee will affect Illinois. For as Cliver testified, notwithstanding any such "biological inactivation," deactivation of any viruses discharged into Lake Michigan in the winter could take months. [Tr. 10314, 10315.][6]

The third factor that defendants contend is not included in the die-off rates, but which affects the number of bacteria or viruses that would survive the trip from Milwaukee, is predation or grazing. Since bacteria or viruses are frequently adsorbed to organic material, if the organic material is ingested by organisms living in the lake, then the bacteria or viruses are also consumed. There is no doubt that organic material in the lake is consumed by the various living things in the lake. [E.g. Tr. 10086.] Defendants principally rely upon the testimony of Robert Otto, an aquatic biologist at Johns Hopkins University, and a report [D.Ex. 1321] prepared by him. Otto testified that macrobenthic organisms, which live on or in the bottom of the lake, "eat just about anything they can get their hands on that is on the bottom ...." [Tr. 10082; see Tr. 10084.] Otto further explained that:

> In some cases [the macrobenthic organisms] don't have the grinding capabilities to break down some kinds of organic material, but bacteria, of course, often have the ability to use these materials. If you ingest a particle which has a nice coat of bacteria, which are a live food source, these organisms can then digest the bacteria but not the particle, so they just clean the

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[6] The bacteria ordinarily found in sewage do not produce the proteolytic enzymes that accelerate deactivation of viruses. [Tr. 10326-10329.]

> particle off and send it back out to be recolonized by the bacteria.

[Tr. 10084-10085.] Otto does not refer to viruses but we assume they are subject to the same predation as bacteria. That macrobenthic organisms digest the bacteria on the outside of a particle is significant, but not dispositive, since we are also concerned about bacteria or viruses embedded in the solids. Furthermore, bacteria adsorbed to the outside of a particle will have been exposed to some chlorine even if it has been rendered less effective by combination with organic material in the effluent. Finally, to the extent that there are macrobenthic organisms that do have the "grinding capabilities or the digestive capabilities" to use the organic material, they only affect material that has settled to the bottom. As noted above, since fecal material has a specific gravity near that of water, much of it will remain suspended in the water column.

Otto also testified that there are three forms of zooplankton that swim in the water column, and that,

> Some forms eat phytoplankton [herbivorous]. Some forms are predatory in the sense that they eat other zooplankton [carnivorous]. Some types are omniverous in that they will eat other zooplankton if they can catch them. They will eat phytoplankton if they happen to run across them. They will eat particulate matter if that happens to come along.

[Tr. at 10086.] Only the omnivorous form of zooplankton eat particulate matter. Defendants asert that the report prepared by Otto [D.Ex. 1321] "indicates the abundance of the many predator grazing organisms in the lake." [Joint Memorandum at 40.] That document relates solely to macrobenthic organisms. There is no evidence that omnivorous zooplankton are present in Lake Michigan in any significant numbers. In fact Otto's testimony suggests exactly the opposite, for, in summarizing his testimony concerning the interrelationships of the organisms that live in the lake, he said, "In general zooplankton eat phytoplankton and macrobenthics eat just about anything they

can get their hands on that is on the bottom, and fish eat zooplankton and macrobenthics."[7] [Tr. 10081-10082.] Thus, it appears that although there are some omnivorous zooplankton, most of them are herbivorous. Moreover, zooplankton suspended in the water, would presumably be picked up in the water sample, in which case a die-off rate based on the observed die-off rate in a lake water sample would include some predation. In any event, based on the evidence presented, it appears that the most significant predation occurs with respect to viruses and bacteria that have settled to the bottom.

The fourth factor, ultraviolet radiation, is probably not accounted for in die-off rates based on laboratory observations. Although defendants concede that ultraviolet radiation is "not very significant," they argue that it should have been considered. Their witness Cliver testified that it would affect only a "very superficial layer of water" and would have no "significant effect on viruses within the water column." [Tr. 10311.] Plaintiffs' witness Melnick testified that ultraviolet radiation would deactivate viruses only in the top 1/10 of an inch of water and then only if they remained there for several minutes. [Tr. 2292.] We are not referred to any evidence that the effect on bacteria would be substantially different.

The district court's finding that pathogens discharged at Milwaukee are sometimes carried "live and intact" to Illinois waters is not clearly erroneous, even considering each of the assertedly independent factors urged by defendants.

C. Dillution and Distance from Shore

Even if pathogens live long enough to be transported from Milwaukee to Illinois and there are no other factors that would significantly reduce their numbers, dilution in the lake would reduce their concentration in a particular parcel of water. The district court found that although there was some dilution, it

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[7] Presumably, some fish might also eat organic material containing pathogens. Defendants do not, however, refer us to any evidence in the record on this point.

did not reduce the concentration of pathogens to insignificance. [Tr. 14217.] That conclusion is amply supported by the evidence presented at trial. Geldreich, it will be recalled, testified that a fecal coliform count of 1,000/100 ml indicates a high probability that pathogens would be present. *See* discussion of fecal coliform, *supra.* Defendant's witness Carter, using data found in the record,[8] including an initial fecal coliform concentration of 35,000/100 ml, calculated that the fecal coliform concentration of water at the Illinois border, not including any die-off, would be 4,014 fecal coliform per 100 ml. [Tr. 8924-8925.][9] Csanday, whose testimony on this point the court found credible [see Tr. 14216-14217], testified that if the current speed was 30 cm/sec., which Csanady testified was typical in Lake Michigan, dilution would have reduced the fecal coliform concentration in water beginning at Milwaukee by only 15% when it reached the Illinois boundary. [Tr. 2013-2014, 2054.] See *Diffusion and Dispersion, supra,* at 116-117 [P.Ex. 20]. Applying the *Canale* die-off rate, Csanady estimated that a fecal coliform concentration of 10,000 per 100 ml[10] would be reduced to 3,000 per 100 ml at the Illinois boundary, considering dilution and die-off. [Tr. 2053, 2054.] Defendants do not directly contest this point; rather they argue that in addition to dilution and die-off, the four "independent" factors already discussed should have been considered.

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[8] He used a diffusion velocity w = .33 [which was the average diffusion velocity found in the Pritchard-Carpenter study (P.Ex. 227) as estimated in D.Ex. 1164], a flow rate of 13,000 cubic feet per second [as indicated in D.Ex. 1164], a current speed of 1.19 feet per second [as indicated in D.Ex. 1164], a distance of 1.97×10^5 feet [as indicated in D.Ex. 1164], and an initial fecal coliform count of 35,000 per 100 ml [based on data in P.Ex. 148].

[9] Using the .58 die-off coefficient that defendants argued was proper [D.Ex. 1164], Carter calculated that the concentration at the Illinois line would have been 1,321 per 100 ml. [Tr. 8932-8933], well over the 1,000/100 ml indicator that Geldreich's testimony established.

[10] As stated in the text, *supra,* the fecal coliform counts for the raw sewage discharged from the overflow points on defendants' sewer system is sometimes much higher than 10,000/100 ml.

Whatever effect dilution may have, any viruses or bacteria that are in the water are reconcentrated to some extent on the water intake filters of drinking water treatment plants. [Tr. 13268-13269.] Generally reconcentration is not of great significance, but if there is a breakdown in the filtering system this high concentration of viruses will flow into the system and, if treatment is not adequate, into the drinking water supply. [*Id; see also* D.Ex. 34, p.4.]

Defendants contend that if bacteria and virus live long enough to be transported to Illinois waters and are not reduced to insignificance by dilution or other factors, they nevertheless remain too far from the shore to have any effect on Illinois water supplies or to be of any consequence to Illinois swimmers. Although the district court made no express finding on the distance from shore at which pathogens arriving in Illinois from Milwaukee will be found, the fact that the pathogens will be close enough to affect water supplies and swimmers is implicit in the court's finding that "[o]nce these pathogens arrive in Illinois waters, they can infect and cause disease in residents of Illinois ... in two ways: by ingestion of these waters at bathing beaches by swimmers and by ingestion of drinking water containing these pathogens." [Tr. 14221.] There is evidence sufficient to support the finding that pathogens arriving in Illinois waters from Milwaukee will be close enough to shore to affect Illinois residents.

Defendants contend that Csanady's testimony clearly shows that "pollutants, either conservative or nonconservative, which may have entered Lake Michigan at Milwaukee never get close enough to shore in Illinois to cause any hazard." [Joint Memorandum at 46.] Even the passage relied upon by defendants does not support the proposition. Csanady testified that although the center of a dye plume, used to simulate pollution movement, might be located several kilometers from shore,

> The concentration simply decreases from the center as you go shoreward .... The maximum occurs a certain distance from shore. But it doesn't decrease to zero.

[Tr. 2584.] In other words, lateral diffusion of the dye plume would result in some of the dye reaching the shore even though higher concentrations would be found further offshore. Defendants' witness Pritchard also testified that this would occur. [Tr. 6564.] Furthermore, in a passage not cited by the defendants, Csanady testified that a dye plume would move back and forth in an area extending from the shore to about 6 miles out in the lake. [Tr. 2586.] In response to the question of whether peak concentrations would ever move on shore, Csanady answered, "Yes, and there would be situations where the slug [or dye plume] meanders on shore and hits areas closer to shore." [Tr. 2025.] It seems fairly obvious that whether or not a dye plume or pollution will hit the shoreline depends in large part on wind direction. [See P.Ex. 222, 223, 224 (dye studies conducted at Milwaukee beaches in 1963).] Indeed, based on his study of pollution data from the Evanston-North Shore beaches and the associated wind directions, Geldreich testified: "It is quite obvious that there are occasions when the wind, when it is blowing from the northeast, is pushing pollution on those beaches." [Tr. 3111.]

Defendants also argue that upwelling and downwelling of the lake water operate to carry any pollution in the near shore areas out into the center of the lake in the manner described in the margin.[11] There are several factors that can cause upwelling or downwelling and at any particular time there may be more than

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[11] In winter, when throughout the depth of the lake the temperature is fairly uniform, the effect of upwelling and downwelling is less significant than in summer, when the temperature decreases with depth. In summer the upper layer of the lake, the epilimnion, and the bottom layer, the hypolimnion, are separated by an intermediate layer, the thermocline. Since heat from the sun warms the epilimnion and to a lesser degree the termocline, but has little effect on the hypolimnion, the temperature at the three levels varies. [Tr. 2071-2072.] Water is heaviest at 4 degrees Celsius (or 39 degrees Fahrenheit); at temperatures either above or below 4 degrees Celsius, water is lighter. The temperatures in the hypolimnion stay close to 4 degrees Celsius, and therefore the water generally remains at the bottom. [Tr. 2072.]

(Footnote continued on following page)

one contributing factor, but the most important appears to be wind. [E.g. Tr. 6498-6502.] If the wind blows from the west, surface waters on the western side of the lake move offshore and

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Footnote 11 (continued)

Water in the epilimnion generally remains on the top since it is warmer than 4 degrees Celsius and therefore lighter than the water at the bottom. As might be expected, in the intermediate layer or thermocline, the temperature increases rapidly from bottom to top. According to Csanady, "The physical effect of that rapid temperature change is to suppress the movement of parcels of the fluid." [Tr. 2072.] Consequently, the thermocline "becomes an effective floor for the mixing processes in the top of the lake ...." [*Id.*] Thus any pollution discharged in the winter which does not remain suspended near the top because of its specific gravity can mix with water all the way to the bottom. [Tr. 2022-2023.] But such pollution discharged in the summer after the thermocline has formed can only mix with the water down to the thermocline, reducing the dilution and increasing the concentration. [*Id.*]

Upwelling in the near-shore area would cause the surface waters to move toward the center of the lake. The near-shore surface water, having moved offshore, is replaced by deeper near-shore water, which is in turn replaced by deep offshore water. In winter since any pollution in the near-shore waters can mix to the bottom, the result is that polluted surface water near the shore will be replaced by deeper near-shore water, which may also be polluted to some extent and is in turn replaced by at least arguably cleaner offshore water, with the result that the pollution in the near-shore zone will be diluted.

Similarly, but perhaps more important, upwelling in the near-shore zone when the thermocline prevents mixing in the lower levels of water causes relatively clean water to replace the polluted surface waters that move offshore. The deep near-shore water is then replaced by cleaner deep offshore water. Upwelling in the summer causes the heavier water from the bottom to move to the top. When the force causing the upwelling stops, the heavier water sinks back to the bottom and is replaced by offshore warm surface water. [Tr. 6499-6501.]

For a detailed description of the upwelling/downwelling phenomenon see Mortimer, "Physical Characteristics of Lake Michigan and its Responses to Applied Forces," 2 *Environmental Status of the Lake Michigan Region* 35-43 (1975) [P.Ex. 20].

there is upwelling on the western shore and downwelling on the eastern shore; if the wind is from the east, then there is downwelling on the western shore and upwelling on the eastern shore. Nevertheless, the experts agree that whatever the wind direction the predominate current in the near shore area is shore parallel, either north or south. [Compare Tr. 6508, 6584 (Pritchard) with Tr. 1955-1956, 1947 (Csanady).] Indeed, the near-shore zone is sometimes defined as the area in which the predominate currents are shore parallel. [Tr. 6577; P.Ex. 38] Sato & Mortimer, *supra,* at 286 [Tr. 6577; D.Ex. 38].

Assuming that any upwelling on the western shore would clean out the near-shore waters, we cannot conclude that the pollution discharged at Milwaukee does not come close enough to shore to affect Illinois residents. At most, this evidence shows that discharges from Milwaukee would not build up over time in the near-shore waters. Moreover, as Pritchard's Ocean City, Maryland, experiments demonstrate, downwelling on the western shore will cause any pollutants in the near-shore zone to move toward the shore and sometimes all the way to the shore. [See Tr. 6565-6569.]

D. Danger to Illinois Residents

As noted above, the district court found that there were two ways in which pathogens discharged at Milwaukee can affect Illinois residents: "ingestion of these waters [containing pathogens] at bathing beaches by swimmers and by ingestion of drinking water containing these pathogens." [Tr. at 14221.] If there are viruses in the lake, swimmers may be infected. Melnick testified that "if they have minor cuts or abrasions on their skin, if they get water in their mouth or nose, they could pick up the virus and become infected." [Tr. at 2218.] It follows that if there are viruses in drinking water, the people drinking it may also be infected.

Two points should be noted concerning the hazards to swimmers. First, although any danger to swimmers exists only in summer when the lifespan of viruses and bacteria are shortest due to "warmer" water temperatures, the evidence discussed

above shows that even at 70 degrees Fahrenheit (21 degrees Celsius) viruses will survive for about two weeks [(Tr. 2199)] and bacteria will survive for at least 2 days [(Tr. 3092.)] Except in July and August, water temperatures in Lake Michigan seldom reach 70 degrees F;[12] at the lower temperatures more frequently found in Lake Michigan both viruses and bacteria will survive for longer time periods. [Tr. 2199, 3092.] Second, because of what was referred to at trial as the "coastal jet phenomenon", lake currents in summer are likely to be much more rapid than in winter, sometimes reaching speeds as high as 50 cm per second, which would carry effluent released at Jones Island to Illinois waters in less than two days. [Tr. 2009-2010; for an explanation of the coastal jet phenomenon *see* Tr. 2097-2098.] A current of 50 cm/sec would of course carry any effluent discharged at the South Shore plant to Illinois waters in even less time.

The district court found that viruses can and do get through drinking water treatment plants "both when the plant is being operated properly and even more so should the plant experience a breakdown." [Tr. 14222-14223.]

Organic matter in raw water from the lake may be concentrated on filters in water treatment plants, and when there is a breakdown or the filter fails to function the matter comes through. [Tr. 13269.] Viruses can be washed through with particulates when the filter is cleaned by flushing or pH is changed. [Tr. 13272.]

Viruses or bacteria in Lake Michigan can only affect Illinois drinking water supplies if they remain in the water after treatment. Tap water, after passing through a drinking water treatment plant, may contain particulate matter. [D. Ex. 34, p.4.] Wellings, although not an expert on drinking water treatment plants, testified that such particulate matter might contain

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[12] *See, e.g., Sato & Mortimer, supra,* [P.Ex. 38] at 64, 68, 72, 74, 78, 80, 82, 86, 88, 93, 94, 96, 100,102, 106, 110, 114, 118, 122, 124, 126, 130, 132, 138, 142, 144, 146, 150. [*See also* Tr. 10314-10315.]

viruses. [Tr. 13265.] In addition, Berg testified that "solid coloidal material" remaining in treated drinking water and referred to in two articles introduced by the defendants' [D. Exs. 3 and 34] as "turbidity" may contain viruses. [Tr. 12077, 12080-12082.] The testimony of Wellings and Berg indicates that viruses embedded in "particulate matter" [Tr. 13265-13266] or "solid coloidal matter" [Tr. 12080-12081] can survive the chlorination that occurs in water treatment plants. [Tr. 13265-13266 (Wellings as to particulate matter); Tr. 12080-12081 (Berg as to solid coloidal matter).] Although the evidence that a properly designed and operated water treatment plant will not provide adequate protection against pathogens in the raw water is less than compelling, it raised a debatable issue that the trial court was justified in resolving against defendants.

Moreover, the effectiveness of water treatment plants is not determined only by their optimal performance. Sometimes they do not operate at peak efficiency. Berg testified as follows:

> If a [drinking water] treatment plant breaks down at some point in time for some period of time, even for a very short period of time, during that period of time when there is perhaps inadequate removal of the solid material, when there is lack of chlorination, then any impact that raw water coming in may have by way of pathogenic agents, viruses or anything else, can presumably become a problem.
>
> Q Doctor, are you familiar with the public health principle articulated in the fields of microbiology and virology of a double tier protector?
>
> A. Yes. The multiple barrier
>
> ....
>
> A. (continuing) that we speak of, which means that you try to protect the raw water as much as you can so that in the event that something does happen at a treatment plant that you don't bring

> about an insult that can be carried through the plant and in this respect, carry through into the finished water pathogenic organisms or viruses.

[Tr. 12082-12083.] Melnick and Geldreich also testified that the possibilities of human error or mechanical breakdown make it imprudent to rely on water treatment plants to remove viruses from drinking water supplies. [Tr. 2191-2192 (Melnick); Tr. 3106-3107 (Geldreich); see Tr. 13267 (Wellings).]

The trial court's finding that viruses discharged into Lake Michigan at Milwaukee pose a hazard to Illinois drinking water supplies is therefore not clearly erroneous.

E. Accelerated Eutrophication

The district court found "that the defendants' sewage discharges into Lake Michigan are presently contributing in a substantial way to the accelerated eutrophication of the inshore zone of the western shore of Lake Michigan, including waters of Lake Michigan which are within the territorial boundaries of the State of Illinois." [Tr. 14242-14243.] Defendant's challenge to this finding is that the court did not quantify their contribution to accelerating eutrophication and that this was error because there are other contributors and defendants should not have been singled out. They do not question that they made the contribution, only its relative magnitude.

The significance of the court's eutrophication finding in relation to the issues to be decided is less than clear. As we explain below, the principal offending contaminant is phosphorus.[13] Defendant sewerage commissions acknowledge that "the trial court has merely enforced the defendants' discharge permit phosphorus requirements" (1 mg/l), but they then add,

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[13] Illinois asserts that sewage and effluent contain unspecified "other nutrients" that contribute to eutrophication. There were no findings made or relief granted with respect to these other nutrients, so we need not discuss them further.

"though different and costlier timetables are imposed." [Sewerage Commissions' Brief 28.] In our examination of the effluent limitations in the court's order and the discharge permits, undertaken without any guidance beyond the characterization quoted, we have been unable to discern any basis for that characterization. The permits' timetables for the phosphorus limitation seem to require compliance earlier than does the phosphorus limitation in the order. Thus the latter would, as a practical matter, appear to be academic. Nevertheless, because there is at least a theoretical possibility that the permit limitation will be relaxed, and also because the raw sewage discharges not covered by the permit contain phosphorus, we shall briefly examine the evidentiary basis for the eutrophication finding.

The term "eutrophication" refers to the gradual increase of nutrient concentration in a body of water, which results in increasing concentrations of phytoplankton and other living organisms. [Tr. 2822-2826.] The evolution of a body of water from oligotrophic (low nutrient concentrations) through mesotrophic (moderate nutrient concentrations) to eutrophic (high nutrient concentrations) is a natural process. See, *e.g.*, Sawyer, "Basic Concepts of Eutrophication," 38 *Jl. of W. P. C. Fed.* 737 (1966) [D.Ex. 1213]. Nevertheless, man's input of nutrients can drastically accelerate the process. See, *e.g.*, Sawyer, ABC's of Cultural Eutrophication and its Control: Wastewaters, Part 2," October *Water & Sewage Works* 322 (1971) [D.Ex. 1215]. Liminologists regard phosphorus as a "controlling element" in eutrophication [Tr. 2883-02884]. See, *e.g.*, Sawyer, "The Need for Nutrient Control", 40 *Jl. of W. P. C. F.* 363, 367-368 (1968) [D.Ex. 1214]; Sawyer, "ABC's of Cultural Eutrophication and its Control: Wastewaters, Part 2, *supra,* [D.Ex. 1215]. In other words, since phosphorus is necessary to support the growth of phytoplankton, limiting phosphorus inputs will impose an upper limit on the quantity of phytoplankton that a particular body of water can support. Sawyer, "ABC's", *supra;* Sawyer, "Nutrient Control", *supra* [D.Ex. 1214, 1215,] . Thus, although limiting phosphorus does reduce the nutrient concentration, the more important effect of such a limitation is that it

reduces the external manifestations of eutrophication. Phytoplankton and other organism resulting from eutrophication reduce the clarity of the water, cause objectionable smells, deplete the oxygen supply of the water, and may affect the quality of drinking water supplies. [Tr. 2826, 2924-2925.] Lake Michigan is experiencing accelerated eutrophication [Tr. 2883-2884], particularly near Milwaukee. *See* An Environmental Study of the Ecological Effects of the Thermal Discharges from Point Beach, Oak Creek, and Lakeside Power Plants on Lake Michigan, 10.0-49 to 10.0-50 (1974) [P.Ex. 2]. [Tr. 2879-2880; *compare* P.Ex. 144 at 20 and 72 *with* Tr. 2854.]

Determining what proportion of the total phosphorus discharges into Lake Michigan is contributed by Milwaukee seems hardly feasible and was in any event unnecessary. It is enough to support the limited relief granted with respect to phosphorus that Milwaukee's contribution was substantial.

II.

Evidence Relied on to Support 5 mg/l Limitations

The most specific evidence relied on by Illinois to support the 5 mg/l suspended solids effluent limitation imposed by the court is Wellings' testimony that similar solids limitations are used in St. Petersburg, Florida and that lower effluent solids content results in more effective disinfection:

> A. Our aim in St. Petersburg is to reduce solids to a 5, Jackson, JTU, Jackson Turbidity [U]nits, which is less than, I think probably 5 milligrams per liter of solids.
>
> Then that gives you the opportunity to have an effective chlorination. [Tr. 12397.]
>
> . . . .
>
> THE COURT. If you have say 5 milligrams per liter of solids, does that help the chlorine remove or

kill the viruses associated with those solids more than would be the case if you have 30 milligrams per liter?

THE WITNESS. Well, the problem with 30 milligrams per liter is you are going to have a lot of organics tied up with solids that is going to use up your chlorine, and the chlorine can't even get into.

THE COURT. I see. So the fewer solids, the less chlorine is used up in other ways.

THE WITNESS. That is right, and that is the reason if you get it down low enough you will have enough active chlorine that can really get to the solids. [Tr. 12398].

. . . .

Q. [Illinois' counsel] Doctor, whenever we are finding high solids -- well, is it your opinion that even at 30 milligrams per liter of solids that we have a problem with disinfection?

A. I think you would still have a problem with disinfection.

I really don't know how I would equate Jackson Turbidity Units with milligrams, you know, because you would have to know size, shape and all that, source, because of the test itself, but I would say 5 milligrams per liter would be well in the ball park.

. . . .

THE COURT. What do you mean by that phrase? Do you mean that would be what you would desire?

A. Well, I wouldn't want any more than that.

THE COURT. You would not want any more than that?

THE WITNESS. I would prefer much less, but I wouldn't want any more than 5.

Q. [Illinois' counsel]. So if we could perform at a maximum of 5 but consistently there would be ones and twos, would that be it?

A. Yes. [Tr. 12401-12402.]

To support the 5 mg/1 BOD_5 effluent limitations, as well as the solids limitation, plaintiffs rely on Geldreich's testimony that for most effective disinfection, BOD_5 and solids should be reduced as much as possible:

Q. [Illinois' counsel]. With respect to the question of BOD, which you have indicated interfered with the chlorination process, do you have any opinion as to how low we should get the BOD?

A. As low as possible.

Q. If you could achieve four milligrams per liter BOD through an advanced waste treatment facility, would that be desirable from the standpoint of chlorination?

A. Yes, sir.

Q. With respect to removal of solids, you indicated the solids problem being the encapsulation situation, with respect to effective disinfection through the use of chlorine, do you have any suggestion as to the level that you would want to have for solids?

A. Five milligrams per liter would be desirable.

Q. When you say five milligrams per liter, if that were achievable at an advanced waste treatment facility, would you approve of such a standard?

A. Yes, sir. [Tr. 3090-3091.]

Plaintiffs also rely on Berg's testimony that solids and organics interfere with chlorination:

> Q. [Illinois' counsel]. So, if we have got fecal material or any other materials surrounding the viruses and you put chlorine on it, will that kill it?
>
> A. The chlorine isn't going to penetrate very far. It is not going to kill embedded virus.
>
> Q. Would it be fair to say that in order to have effective chlorination of the material that you are chlorinating, you should remove the solids?
>
> A. That is correct.
>
> Q. With respect to the organics, do you also try and remove the organics?
>
> A. Yes. You would want to do that in order to prevent or reduce the formation of the compounds that are less effective. [Tr. 12068.]

Plaintiffs assert that Berg "testified that plant effluents of 50 or 100 mg/1 BOD or suspended solids ... would have no virus removal" [citing Tr. 12118-12120, Supplemental Memorandum of Plaintiff-Appellee State of Illinois 106]. The following passage from the transcript is cited in support of that assertion but does not appear to us to support it:

> Q. [Illinois' counsel]. If you were getting [residual chlorine measurements of] ... less than .1 by means of the orthotolidine method with respect to effluent from the standpoint of chlorination as a viricide, would you give an opinion as to the effectiveness of such chlorination as a viricide?
>
> .... [Objection overruled.]

> THE WITNESS. If we are talking about sewage effluent, the secondary effluent, from an activated sludge plant, that contains any substantial amount of ammonia as they usually do unless there is a special treatment to remove it, then all of that chlorine is going to be combined chlorine.
>
> Q. That would also assume, if you would assume, the presence of numbers of solids in the 50's or hundreds and the BOD in the 50's or hundreds?
>
> A. We have looked at some plants with levels like that.
>
> .... [Objection overruled.]
>
> A. ... We have looked at plants where we have seen chlorine levels, combined chlorine levels of 2, 3 parts per million, and we haven't been able to differentiate the amount of virus going in from the amount of virus going out. [Tr. 12117-12119.]

Residual chlorine content is related to solids and BOD_5 content, but Berg does not seem to have been saying that 50 or 100 mg/liter suspended solids or BOD_5 would result in "no virus removal." Indeed, Berg pointed out that the effectiveness of chlorine as a viricide, whatever the solids or BOD_5 content of the effluent, will vary depending upon the manner in which chlorine is introduced into the effluent. [Tr. 12119-12120.]

Plaintiffs also rely on Gordon Culp's testimony, suggesting that the kind of treatment necessary to meet the effluent limitations imposed by the district court is preferable to the kind of treatment now used by the defendants:

> Q. [Illinois' counsel]. When you talk about coagulation and settling combined with filtration, you get a very stable, very uniform, very low concentration of contaminants in the effluent, is that right?

A That is right. It is very consistent. You are no longer dependent on the gravity separation, only of a very light flocculent biologic material, biologic material which can vary in its settling capabilities from day to day. Now you have very positive control with the solids.

Q. Let me just ask this. You were a trained engineer dealing with an activated sludge plant -- were you very conscientious about its performance?

A. Yes.

...

Q. Now, despite your trained engineering supervision of that plant, were you able to get a consistently low solid and BOD out of the activated sludge plant?

A. No.

Q. Are the upsets in an activated sludge plant something that you can predict? Can you sit back and say "We are going to have a bad day tomorrow?"

A. No, you certainly cannot. There are some conditions, of course, which will occur which will allow you to predict that, but the normal operation, no.

[Tr. 13006-13007.] Finally, plaintiffs note that one of the defendants' consultant sanitary engineers recommended treatment similar to that required to meet the effluent limitations imposed by the court, that three cities have been required to meet similar effluent limitations, and that several other cities have decided to make additions to their own treatment facilities similar to those that will be required under the court's order.

The reasons supporting our finding that this evidence is insufficient to support the 5 mg/l BOD_5 and suspended solids limitations are stated in our published opinion and need not be repeated here.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

June 14, 1979

Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. ROY W. HARPER, Senior District Judge*

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

and

PEOPLE OF THE STATE OF MICHIGAN,
Intervening Plaintiff-Appellee,

No. 77-2246 vs.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Defendant-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 72-C-1253

John F. Grady,
Judge.

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* The Honorable Roy W. Harper, Senior District Judge of the United States District Court for the Eastern and Western Districts of Missouri, is sitting by designation.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by counsel for the plaintiff-appellee, no judge in regular active service having requested a vote on the suggestion for rehearing in banc, and all members of the original panel having voted to deny a rehearing,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PEOPLE OF THE STATE OF ILLINOIS, ex rel., WILLIAM J. SCOTT, Attorney General of the State of Illinois,	)	
Plaintiff,	)	
PEOPLE OF THE STATE OF MICHIGAN,	)	
v.	)	Case No. 72-C-1253
CITY OF MILWAUKEE, WISCONSIN; CITY OF KENOSHA, WISCONSIN; CITY OF RACINE, WISCONSIN; CITY OF SOUTH MILWAUKEE, WISCONSIN; THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,	)	
Defendants.	)	

JUDGMENT ORDER

This cause having come on trial before this Court, and the Court having heard the witnesses and having examined the exhibits admitted into evidence, and the Court having heard the legal arguments for the parties, and the Court, on July 29, 1977, from the bench having announced its "FINDINGS OF FACT AND CONCLUSIONS OF LAW."

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendants CITY OF MILWAUKEE, SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY MILWAUKEE and each of them and their agents, employees or successors in interest are hereby permanently enjoined from emitting sewage discharges, from the respective sewer pipes or structures owned or maintained by the defendants, into Lake Michigan or any of its tributary waters, except as hereinafter permitted in this order and said defendants are hereby ordered to:

(1) The respective defendants shall in their respective jurisdictions eliminate all sewage overflows emanating from sewer pipes or structures owned, operated or maintained by the defendants located outside of the area which was designated by the defendants at trial as the Combined Sewer System Area hereinafter ("CSO"). Elimination of such overflows shall be completed on or before July 1, 1986. For purposes of this order, an overflow is defined as a crossover, bypass, diversion structure, relief structure, pump station or any other device or mechanism by which human fecal waste is discharged directly or indirectly to public streams, rivers or lakes without collection and treatment according to the treatment methods and effluent limits set forth in paragraph (3) below. If, in defendants' opinion, completion by such date becomes impossible due to circumstances beyond defendants' control, then defendant(s) may apply to the Court for an extension of time for completion. Any such application, if opposed by either plaintiff, must be predicated on an evidentiary hearing preceeded by adequate opportunity for discovery by plaintiffs. Defendant shall be required to prove the basis for and the necessity for such extension which extension shall be granted or denied in the sound discretion of the Court. Defendants shall pay plaintiff(s)' entire costs of any such

application including reasonable attorneys' and experts' fees, and the costs of discovery, preparation and presentation of their position.

(2) The Commission defendants shall in three stages, the first to be completed on or before December 31, 1985; the second on or before December 31, 1987; and the third on or before December 31, 1989, put into operation a collection, and conveyance system in the combined sewer system area ("CSO") which shall collect and convey all human fecal waste entering the sewers in the combined sewer system area. The first stage of such system shall have storage capacity of not less than 700 acre feet, the second not less than an additional 1290 acre feet, and at the completion of the third stage (December 31, 1989) the entire system shall have storage capacity of not less than 2605 acre feet and shall be designed and operated within such storage capacity so as to collect, convey and store the volume of flow and all human fecal waste capable of transmission by the combined sewer system. Defendants have analyzed rainfall events experienced during the period 1940 through the date hereof (which is the period for which detailed hourly rainfall data is available) and have represented to this Court that their analysis demonstrates that at a storage capacity of 2605 acre feet, there would have been no overflows from such a system. All fecal wastes and flows collected and conveyed from the combined sewer area shall be treated according to the treatment methods and to the effluent limits set forth in paragraph (3) below.

Overflows, if any, which do occur shall constitute a violation of this order unless defendants can prove as a defense to a charge of violation either:

(1) that the overflow resulted from runoff conditions which exceeded the capacity of the 2605 acre

feet of storage at a pump out rate to advanced treatment of 110 CFS; and that the runoff events which resulted in the overflow would have caused an overflow in excess of the design capacity of the 2605 acre feet storage system at 110 CFS under the identical scientific premises and calculations used by the defendants prior to the date of this order to design the size of such storage system; or in the case of overflows resulting from causes other than excess runoff events,

(2) that the overflow was wholly caused by actions or occurrences wholly outside the control of the defendants and was in no way caused or contributed to by the negligence of the defendants.

Any defense to an overflow violation shall be predicated on an evidentiary hearing preceded by an adequate opportunity for discovery by plaintiffs. Defendants shall bear the evidentiary burden of proof of establishing the defenses listed above, and if the Court finds that the defense has not been proven, shall pay plaintiff(s)' entire costs of opposing any such defense including reasonable attorneys' and experts' fees and the costs of discovery, preparation, and presentation of plaintiffs' position. In any event, any overflows which may conceivably occur shall be subjected to treatment by bar screens, followed by drum screens, followed by chlorination prior to discharge. Should defendants develop information which establishes in defendants' opinion that separation of all or part of the system is a preferred alternative, which will provide a collection and treatment level equal to or better than that required herein then defendants may apply to the Court for modification of this paragraph to provide therefor. Any such modification, if opposed by either plaintiff, must be predicated on an evidentiary hearing preceded by adequate opportunity for discovery by plaintiffs. Defendants shall bear the evidentiary burden of proof of establishing that such modification equals or exceeds the level of protection provided herein. Defendants shall pay plaintiff(s)' entire costs of any such application including reasonable attorneys' and experts' fees, and the costs of discovery, preparation and presentation of their position.

(3) The Commission defendants or their successors in interest shall from and after December 31, 1985 treat all human fecal wastes which reach existing, expanded, or newly constructed treatment plants owned, operated or maintained by the defendants by means of appropriate secondary treatment facilities to be followed by treatment with chemical coagulation, sedimentation, and sand or multi-media filtration which facilities shall as of December 31, 1986 and thereafter produce an effluent which does not exceed five (5) milligrams per liter (mg/l) suspended solids and five (5) milligrams per liter of five (5)-day carbonaceous biochemical oxygen demand (BOD_5). From and after December 31, 1986, there shall be no by-pass at any existing, expanded or newly constructed treatment plant. The effluent requirements shall be calculated on the basis of daily composite samples averaged on a 30 day consecutive basis, provided that the maximum effluent concentration discharged on any given day shall not exceed ten (10) milligrams per liter suspended solids and ten (10) milligrams per liter carbonaceous BOD_5. The effluent shall be treated with chlorine, so as to achieve a free chlorine residual as measured by the amperometric test after 15 minutes residence time. If defendants conclude that some other disinfectant chemical or procedure will provide a level of protection equivalent to such chlorine treatment and is preferable, defendants may apply to the Court for a modification of this paragraph (3) to permit the use of such other disinfectant chemical or procedure. Any such modification, if opposed by either plaintiff, must be predicated on an evidentiary hearing preceded by adequate opportunity for discovery by plaintiffs. Defendants shall bear the evidentiary burden of proof of establishing that the proposed modification will provide a level of protection equivalent to such chlorine treatment.

Maximum fecal coliform counts on any one grab sample shall not exceed 40 fecal coliform per one hundred (100) milliliters. Phosphorous (P) concentrations shall be no more than one (1) miligram per liter based on a monthly average.

(4) Plaintiffs have emphasized their concern to maintain a detailed understanding of defendants' progress in designing and constructing the facilities ordered by the Court. Defendants have agreed to and shall allow plaintiffs, during working hours and upon reasonable notice, to conduct a continuing engineering audit of defendants' progress in complying with this order and have agreed to permit plaintiffs (and persons designated by plaintiffs) complete access to all planning, testing, design and construction or operational work or materials prepared by defendants or their consultants. Defendants have also agreed to and shall promptly pay the reasonable charges or fees of persons designated by plaintiffs to conduct such continuing engineering audit provided that such engineering audit activities to be paid by defendants shall not exceed 50 man days per calendar year; and any of such required payments accrued or made during the course of appeal shall be and remain the obligation of defendants regardless of the outcome of any appeal.

(5) During the periods necessary to complete the facilities required for compliance with the provisions of this order, as set forth above, the defendants shall be permitted, on the basis of using the best engineering practices available within the limits of the capabilities of those facilities, to continue the operations of their respective sewage collection, treatment and discharge facilities as the same may be modified from time to time to comply with the requirements of this order. Existing disinfectant systems shall be maintained and operated in such periods and no new by-passes or overflows shall be installed or operated during such periods except that prior to December 31,

1986 *and not thereafter* a by-pass may be installed and operated if required as a protective device to protect the South Shore Plant and then only if triggered at and operated during the existence of a flow rate equal to or greater than the plant flow capacity (260 to 316 mgd) for flow in excess of such capacity. In the event that plaintiff(s) challenge any overflow as being in violation of the provisions of this order for the reason that such overflow was not triggered by and limited to flows in excess of plant capacity, it shall be the burden of the defendants to prove in an evidentiary hearing preceded by adequate discovery by plaintiff(s) that such overflow was triggered by and limited to flows in excess of plant capacity. If the Court finds that the defense has not been proven, defendant(s) shall pay plaintiff(s)' entire costs of opposing any such defense including reasonable attorneys' and experts' fees and the costs of discovery, preparation, and presentation of plaintiffs' position.

As set forth in paragraph (3) above, all by-passes shall be eliminated by December 31, 1986. If one or more additional temporary overflows become necessary in defendants' opinion in the defendant City of Milwaukee's system for operation to protect the public health prior to December 31, 1986, then defendants may apply to the Court for a modification of this paragraph 6 to permit operation of such additional overflows up to but not after December 31, 1986. All such overflows shall be eliminated by December 31, 1986. Any such modification, if opposed by plaintiffs, must be predicated on an evidentiary hearing preceded by adequate opportunity for discovery by plaintiff(s). Defendants shall bear the evidentiary burden of proof establishing the public health requirements for such modification which shall be founded in such public health requirements as, but not limited only to, preventing the backing-up of sewage in basements. Defendants shall pay plaintiff(s)' entire costs of any such application including reasonable attorneys' and experts' fees and the costs of discovery, preparation and presentation of their position. Nothing herein shall

relieve defendants or any of them from compliance with other applicable discharge standards.

(6) As a joint and several responsibility, defendants shall pay immediately to plaintiffs the amount of $230,000.00, in the manner directed by plaintiffs, as costs of these proceedings, in lieu of following normal procedures to tax costs by the Clerk of this Court. Such sum in total shall be returned to defendants in the event judgment is reversed in toto; in no event shall defendants question the individual items or dollar amounts within such total.

(7) All burdens of proof set forth as requirements of this Judgment Order shall be met by a standard of a preponderance of the evidence.

(8) The Court hereby approves and orders the defendants to adhere to the schedules set forth in Exhibits 1 and 2 attached hereto for compliance with this Judgment Order. If defendants apply to the Court for modification of any component of the time schedules herein, such modification, if opposed by plaintiffs or either of them, must be predicated on an evidentiary hearing preceeded by adequate opportunity for discovery by plaintiffs. Defendants shall bear the burden of proof that such modification is required by causes wholly outside the control of the defendants or their agents, consultants or employees, and was in no way caused or contributed to by the negligence of the defendants or their agents, consultants or employees. The granting or denial of any such application shall be in the sound discretion of the Court.

(9) The Court hereby expressly reserves jurisdiction over the parties hereto and over the subject matter hereof to enforce the provisions of this Judgment Order.

Entered: November 15, 1977

/s/ JOHN F. GRADY
United States District Judge

EXHIBIT 1
MMSD FACILITY PLANNING SCHEDULE

1.1.7.2

11 NOV., 1977

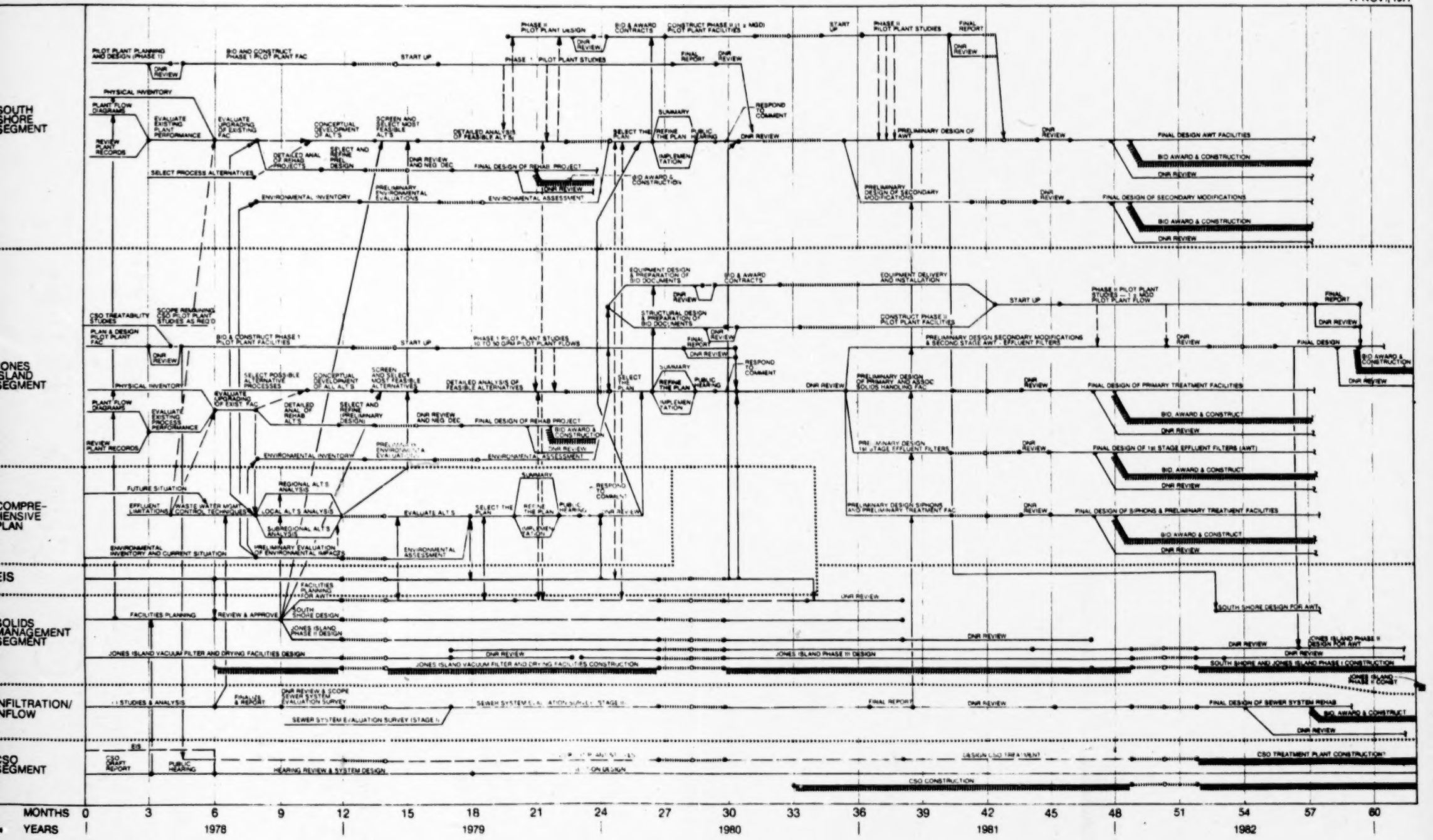
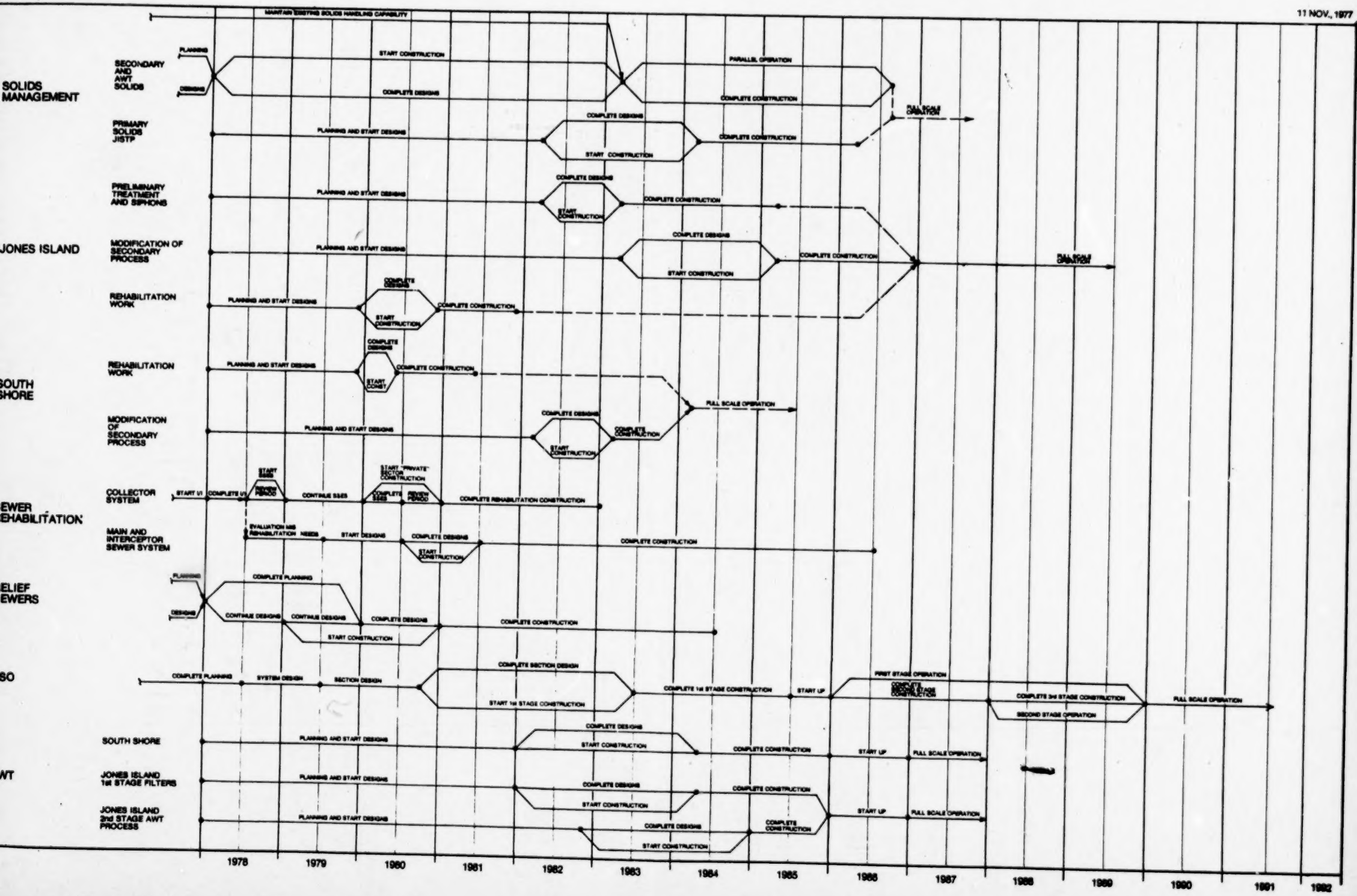


EXHIBIT 2
MMSD PROGRAM SCHEDULE 1.1.7.2



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PEOPLE OF THE STATE OF ILLINOIS, ex rel., WILLIAM J. SCOTT, Attorney General of the State of Illinois,	)	
Plaintiff,	)	
PEOPLE OF THE STATE OF MICHIGAN,	)	
v.	)	Case No. 72-C-1253
CITY OF MILWAUKEE, WISCONSIN; CITY OF KENOSHA, WISCONSIN; CITY OF RACINE, WISCONSIN; CITY OF SOUTH MILWAUKEE, WISCONSIN; THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,	)	
Defendants.	)	

STIPULATION

It is hereby stipulated by and between the parties hereto that the relief necessary to achieve the effluent quality required by the decisions of this court heretofore rendered herein is set forth in the proposed Judgment Order, copy of which is attached.

This stipulation is entered into for the purpose of presenting to the court the specific engineering solutions, with scheduling and effluent standards, required to carry out the general Findings and Conclusions and the general requirements which this court has imposed on the defendants herein in such decisions. Its submission is made to avoid the necessity of adducing extensive expert testimony before the court directed to the same purpose.

The parties agree to be precluded from asserting on appeal any challenge to the engineering feasibility (or to the engineering feasibility of the time schedules for installation) of the transport, collection and treatment facilities and the engineering feasibility of accomplishing the effluent standards set forth in the attached form of Judgment Order.

The parties also agree to be precluded from asserting on appeal any challenge to the engineering audit charges set forth in paragraph (5) of the attached form of Judgment Order and to be precluded from asserting on appeal any challenge to the payments of the trial costs set forth in paragraph (7) of the attached form of Judgment Order. The trial costs set forth in paragraph (7) shall be returned to defendants if Judgment is reversed in toto. The parties also agree to be precluded from asserting on appeal any challenge to the evidentiary burdens and future cost payments imposed by the attached order.

Other than as set out above, this stipulation is entered into without prejudice to the rights of any of the defendants to appeal from the ultimate judgment entered herein upon any and all grounds including without limitation: challenges to the jurisdiction of the court; assignments of error in the determinations of liability and of each and every element thereof; assertions that error has been committed in establishing the various levels of relief in the prior decisions herein; assertions that the findings are not supported by the evidence; and, assertions that the conclusions are not supported by the findings or the evidence.

Upon the foregoing understandings, agreements and stipulations it is further stipulated that a Judgment Order in the form attached may be entered upon motion of any party without further notice than this stipulation, it being expressly understood that defendants hereby agree to make the payments required by said proposed Judgment Order in accordance with the terms thereof when and if such proposed Judgment Order is entered by the court.

Nothing in this stipulation precludes any party from appealing the results of any future evidentiary hearing provided for in the attached Judgment Order on any grounds which are then appealable.

Date: November 14, 1977

PEOPLE OF THE STATE OF ILLINOIS ex. rel.,
WILLIAM J. SCOTT, Attorney General of the
State of Illinois,
by: /s/ WILLIAM J. SCOTT
Its Attorney

PEOPLE OF THE STATE OF MICHIGAN
by: /s/ THOMAS J. EMERY
Its Attorney

CITY OF MILWAUKEE, WISCONSIN
by: /s/ MICHAEL J. McCABE
Its Attorney

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE
by: /s/ RICHARD W. CUTLER
Its Attorney

THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE
by: /s/ RICHARD W. CUTLER
Its Attorney

PEOPLE OF THE STATE OF ILLINOIS, etc., et al.,	)	
Plaintiffs,	)	
vs.	)	No. 72 C 1253
CITY OF MILWAUKEE, etc., et al.,	)	
Defendants.	)	

BEFORE: The Honorable JOHN F. GRADY, Judge.

Friday, July 29, 1977

10:00 a.m.

Parties met pursuant to adjournment.
PRESENT:

MR. KARAGANIS
MR. GAIL
MR. EMERY
MR. SCOTT

MR. MOERKE
MR. MOAKE
MR. MC CABE
MR. H. PITTS
MR. MELIN

THE CLERK: 72 C 1253, People of the State of Illinois, ex rel. William J. Scott, Attorney General of the State of Illinois, et al., v. The City of Milwaukee, Wisconsin, et al.

THE COURT: Good morning.

MR. MOERKE: Good morning.

MR. MC CABE: Good morning.

MR. KARAGANIS: Good morning, your Honor.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THE COURT: I would like to make some preliminary observations on two points of law which are pertinent to the way the court looks at the facts of the case.

I believe that I have jurisdiction to try all three causes of action that are asserted in the complaint. The United States Supreme Court in the case of *Illinois v. Milwaukee,* 406 U.S. 91 (1972), indicated that this is a case to be tried under the federal common law of nuisance, but it did not indicate that pendent jurisdiction to try the state claims would be inappropriate. I have concluded that the case should be decided under the principles of the federal common law of nuisance, but I further believe that the elements required under that cause of action are also the same elements which the court would have to find under the two state claims. Therefore, in my view, it makes no practical difference that the Court is taking the case on all three counts.

The second legal question of preliminary significance is the matter of the burden of proof. What is the standard to be applied? There are the cases which indicate that in controversies between sovereign states, principles of comity require clear and convincing evidence before the right of any state is circumscribed at the instance of another state. And the Supreme Court did not indicate in the case of *Illinois v. Milwaukee* that this was not a case between states. Indeed, by saying that it did have original jurisdiction to try the case concurrent with the jurisdiction of the district court it seems to me that the Supreme Court implied that this is a suit involving different states. Yet the Court did not say that expressly.

I do not believe that it is a suit between states. It would seem to me anomalous to say that the municipalities and agencies that are involved as defendants in this case are the same as

the State of Wisconsin when the fact is that the State of Wisconsin has sued these same municipalities and agencies about subject matter closely related to the subject matter before me. The State of Wisconsin has sued these defendants about the matter of sewage disposal. If the proposition that one cannot sue oneself is as self-evident to you as it is to me, you may agree with me that the State of Wisconsin, at least for purposes of this case, is not the same as the defendants.

I believe that the preponderance of the evidence is probably the standard of proof that is appropriate for this case. Here again, however, due to the way I view the evidence, there is no practical difference in the result I reach, regardless of which standard of proof I employ.

Turning now to the facts of the case, I note that some of the salient ones are not disputed between the parties. For instance, it is not disputed that parcels of water from the Milwaukee area do travel past the state line to the south and do transport materials from the Milwaukee area to the State of Illinois. As another example of an important fact that is not in dispute, the defendants and the plaintiffs agree that sewage overflows and discharges of raw sewage into the lake are undesirable.

There are more facts, however, that are in dispute than are agreed upon, and the nature of the factual dispute is such that I have found it necessary to rely upon expert witnesses to a far greater degree than is normally required in an ordinary lawsuit and even in the typical suit involving matters of science and technology.

Ordinarily, when the trier of fact weighs evidence and attempts to come to factual conclusions, he does so in the light of his own experience and his own observations and his own common sense. Not only is this proper to do, it is something that we specifically instruct juries to do in every jury case.

The nature of the subject matter here, however, is such that my own experience and observations in life are of relatively little

use to me. It is well known to all of us that the arcane subject matter of some of the expert testimony in this case was sometimes over the heads of all of us to one height or another. I would be certainly less than candid if I did not acknowledge that my grasp of some of the testimony was less complete than I would like it to be, but short of enrolling in a university course directed toward a reorientation of my entire education and spending the years that that would involve, I know of no remedy for the problem.

What I have had to do, though, because of the problem, is to rely to a very large extent upon expert witnesses whose credibility impressed me favorably. Both sides have produced in this case expert witnesses whose credentials were impressive, if not overwhelming. Very little effort has been spared by either side to present witnesses who were knowledgeable in the numerous areas of science and technology that are involved in this case.

I think all of these witnesses are interested in the outcome of this case. None of them is neutral as between the parties in this case or as to the hoped for outcome of the case. This is not surprising. These people devote their lives to a study of the questions which confront us here. In doing that, they necessarily come to conclusions and reach points of view and become members of schools of thought on subjects pertinent to this inquiry. That, standing alone, does not make the witness biased in any invidious sense. I have found some witnesses in this case who, despite their obvious commitment to particular points of view, were in my opinion honest, forthright, reasonably objective and who, in my opinion, made a genuine effort to be helpful to me in the resolution of these difficult problems.

I am going to make some comments about some of the witnesses during the course of my remarks today because I believe it will be helpful to the parties in understanding the basis for my decision, and helpful to the reviewing courts in passing upon the validity of the decision I make, to know what I thought of the witnesses. I have re-read some of the testimony since I saw you last. I thought about someone approaching that

task for the first time, without having seen the witnesses, observed their demeanor, seen the interaction between the witnesses and counsel, the interaction between the witnesses and the court, and sometimes even the interaction of the witnesses between themselves in the courtroom. Without the benefit of all those observations, it seems to me that it will be a very difficult task for a newcomer to the case to have the kind of grasp he would like of the probable credibility of the various witnesses. And, therefore, to assist anyone who does read this record, at least to the extent of letting him know what I thought, I am going to make some observations; and I do it for that reason only and not to be unkind or to denigrate anyone unnecessarily.

There were four witnesses in the case who I thought were outstanding. They were outstanding in the sense that they were the best of a number of good witnesses. These were the witnesses Geldreich, Tierney, Wellings and Culp. There was another group of witnesses I felt as almost equally helpful to the court and of very high caliber, both in terms of their competence and in terms of their credibility. Those were the witnesses Carter, Cliver, Katz, Berg, and Mack.

The limnologists were in a class by themselves. It was perhaps accidental but nonetheless significant that they were even treated as a separate class in that they were permitted to sit through the testimony of other witnesses. The limnological testimony was the least conclusive, the least satisfying, the least convincing of any of the testimony in the case. This is no reflection upon the witnesses who gave it but rather a statement describing the state of the art. What we do not know about what goes on in Lake Michigan far exceeds what we do know, and all of these persons readily acknowledged that. The limnologist whom I found most helpful, and upon whom I rely with the greatest feeling of comfort is Dr. Schelske.

There were some witnesses I felt were biased in the undesirable connotations of that term. These witnesses were biased either because they have a personal commitment to one of the parties in the case or because of their devotion to a particular point of view. Some of these witnesses were combative

and unwilling to concede points on cross examination which they should have conceded because they were so obvious. They were on occasion evasive and doctrinaire. These were the witnesses Verber, Zanoni, Pritchard, Fitzgerald, Sproul and Gupta.

The case breaks down into two principal subject matter areas. The first is the matter of public health, and I will address myself to that now.

The defendants in this case discharge disease-causing bacteria and viruses to Lake Michigan in two ways. First is the raw sewage which is discharged to Lake Michigan during wet weather periods through devices known as overflows, by-passes and cross-overs from the sanitary sewer system to the storm sewer system.

The second way in which these pathogens are discharged to the lake is in the form of insufficiently treated sewage effluent discharged from the two sewage treatment plants owned and operated by the defendants. The pathogens are in the effluent for several reasons. One reason is that the treatment time is often insufficient, due to overloading of the plants, and there is not sufficient time to settle out the solids in the sewage. These solids interfere with chlorination, so that the chlorine does not reach the pathogens. Even when the plant is not overloaded many of the solids still fail to settle out.

The defendants attempt to conform their effluent to a standard of 30 parts per million of suspended solids and BOD, but they rarely achieve that standard and concede that before they can meet it with any consistency a substantial amount of additional plant renovation and updating will have to be done; but even if a 30/30 standard were met, it is my finding that that standard would still result in the discharge of staggering numbers of pathogens to Lake Michigan.

These pathogens, once they are discharged to the lake, are on occasion transported by the currents to the waters of the State of Illinois. We know this for several reasons. First of all,

both sides concede that on a number of occasions throughout the year, there are currents of sufficient persistence in a southerly direction and of a sufficient speed to transport from the Milwaukee area pathogens which will still be alive when they reach the Illinois state line.

The bacteria live on the order of four to eight days in the water, and there is a phenomenon known as regrowth, which can result in a substantial replacement of bacteria which die by the birth of new bacteria occurring during the southward flow. Viruses, which I regard as the more serious of the two principal types of pathogens with which we are concerned, live for a week and a half or two weeks in warm water and can live for months in colder water.

There is no doubt that viruses and bacteria have a long enough life span to reach Illinois in the persistent currents which occur a number of times a year. How many times a year this occurs is, of course, impossible to state with any certainty. The plaintiffs' experts estimate something like a dozen times a year. The defendants' experts estimate that it is more like four times a year or possibly even two times a year. But both sides concede that their estimates could be off either on the high side or on the low side.

In addition to the die-off of the pathogens themselves, there is another factor which ameliorates the problem to some extent, and that is the phenomenon of dilution. The water which comes down in a parcel doesn't come down intact in the exact form that it left Milwaukee Harbor. Rather, it dilutes with the other water in the lake.

The experts are in conflict as to the amount of dilution and even as to the proper scientific principle to be applied to determine the amount of dilution. Notwithstanding that dispute — which I resolve in favor of the plaintiffs on the basis of what I perceive to be the greater credibility of their witnesses on the subject — there still is not sufficient dilution to eliminate the viruses and the bacteria from the water which we know arrives in Illinois from Milwaukee on some occasions during the course

of the year. There is no reason not to believe that bacteria and viruses numbering literally in the millions are transported live and intact from Milwaukee to Illinois waters.

The defendants produced a considerable amount of testimony designed to show that the matters of which I have just spoken do not in fact occur or at least do not occur on a scale sufficient to constitute a health hazard to the residents of Illinois. An organization known as Envirex conducted certain studies designed to show that the sewage, when it comes out of the Milwaukee River and when it comes out of the treatment plants, is almost immediately diluted to a degree that only insignificant numbers of pathogens and insignificant amounts of other pollutants could reach Illinois waters, if any could reach Illinois waters at all. These were known as the net studies and the shore studies conducted by Envirex.

I attach almost no weight to these studies. They were conducted without adequate information as to the prevailing conditions, so that the results were impossible to interpret. I refer specifically to the fact that these studies designed to show that currents running to the south would not carry materials to the south were conducted by people who did not know which direction the currents were going in at the time they conducted the studies and took their samples. Neither did the persons who conducted the studies know where on the hydrograph and where on the pollutograph they were at the time they conducted their wet weather studies.

Furthermore, to the extent that these studies show an apparent decrease in the number of fecal coliforms contained in the top three feet of the water, they demonstrate nothing about the number of viruses that might have been in that top three feet of the water. The evidence is clear on both sides that you can have zero fecal coliforms and many viruses in the same parcel of water.

Moreover, the number of samples taken was insufficient. And the depth at which the samples were taken was insufficient to reflect the probable counts which might have been found at other levels.

Something which infected those studies from the outset and which perhaps accounts in some degree for the invalid methodology with which they were conducted was the attitude of Dr. Zanoni, who was in charge of them. It is not simply a matter of inference that Dr. Zanoni started wth the conclusions that he wished to reach and then fitted the data into those conclusions. It is a matter of his express acknowledgment from the witness stand that that is what he did.

If one were to look for a model of how a scientific study should not be conducted, I would commend him to the record of the Envirex net and shore studies. Dr. Zanoni was unwilling to recognize the slightest suggestion that the conclusions which he had reached were not borne out by his data. I could give many examples. I will give simply one. On his direct examination, he testified that the numbers of fecal coliform found in his samples were consistent with the numbers found by the City of Milwaukee in their samples and that this supported his conclusions. On cross examination it was pointed out to him that just the contrary was the case, that there were rather marked discrepancies between his figures and those obtained by the City. Dr. Zanoni's response to that was that he did not know whether the sampling methods conducted by the City were valid. They had been valid enough in his mind for him to tell me on direct examination that they confirmed his own findings, but when it appeared that they did not confirm his findings, he suddenly decided that there was something wrong with their sampling technique. When pursued further as to what their sampling technique was, it developed that he had not the slightest idea of what it was and had no reason whatsoever to suspect that there was any deficiency in it. I give this as one example of many that will be found by anyone who reads the record of Dr. Zanoni's testimony.

Another study conducted by Dr. Zanoni and Mr. Carter was the fecal coliform die-off study. To a lesser extent than in the case of the net and shore studies, this particular experiment is inconclusive at best. Again, only the top three feet of the water column were sampled. The number of samples taken was not small. The amount of water sampled was only a fraction of

the sample size recommended by standard methods. The die-off line which resulted from the study seems to me to have been put askew by an improper starting point. Finally, as I indicated earlier, the numbers of fecal coliform found in any level of the water column bear no particular relation to the number of viruses that might be found there.

Now, the State of Illinois had an opportunity to conduct its own study of the kind that Envirex conducted. It elected not to do so. In so electing, it is my opinion that the state chose to produce less evidence than it should have. My guess as to why they elected not to conduct their own study is that they were afraid of a negative result. Conducting such studies is dangerous because, of course, they cut both ways; but if the position of the State of Illinois is correct, as I believe it is, a properly conducted study should have resulted in some circumstancial evidence that would tend to confirm that theory.

The test would have had to be conducted without the infirmities that I have mentioned in regard to the Envirex studies, and that could have been done. In fact, negative results would not have been fatal to the plaintiffs' case.

Once these pathogens arrive in Illinois waters, they can infect and cause disease in residents of Illinois. This takes place in two ways: by ingestion of these waters at bathing beaches by swimmers and by ingestion of drinking water containing these pathogens.

The defendants' answer to this is that in regard to the bathing beaches, the risk is minimal because the numbers of pathogens are small, and that as far as drinking water is concerned, the treatment plants may be relied upon to remove any harmful organisms.

In regard to the bathing beaches, I am satisfied that the persons who use those beaches cannot do so with safety if there are any significant numbers of viruses in the water. There is a question as to how many viruses it takes to cause an infection. I can't solve that one. The experts are not in agreement, but I

believe, first of all, from the evidence I have heard, that the number is small. If one virus is insufficient, it still need not be hundreds. Moreover, the evidence shows that any viruses which do reach Illinois waters are likely to do so in great numbers.

There are fecal coliform counts on Illinois beaches which fail to demonstrate any pollution coming from Milwaukee, but again, that does not prove that viruses are not in the water.

As far as the treatment plants are concerned, the testimony of Dr. Wellings convinces me that viruses do get through water filtration plants attached to and embedded in solids, which can go through the filters of those plants, both when the plant is being operated properly and even more so should the plant experience a breakdown.

The defendants submitted evidence that there is a substantial diminution of the number of viruses which enter a sewage treatment plant before the effluent is discharged into the lake. There is no question that that is so. I think, however, that the primary factor which accounts for that is sedimentation. I do not believe from the evidence that there is any bacteriological kill of the viruses in the activated sludge process. I feel that Dr. Sproul's conclusions in that regard were based upon insufficient information. I agree with Dr. Wellings' analysis of the Moore study on that subject.

Despite the large percentage of viruses which are deactivated and removed in the process of sewage treatment, there is no question that large numbers of them do get through and are discharged to the lake because of the insufficient treatment of the solids in the effluent, I am satisfied from the testimony of Dr. Wellings and other witnesses in the case that unless there is a good removal of solids and a free chlorine residual, there is not an adequate kill of viruses. There is evidence in the record on both sides of the case which I find convincing on that point. The defendants never have a free chlorine residual by the amperometric test, which I find from the evidence is the more valid of the two methods of measuring a chlorine residual.

The defendants also argue that there is no evidence of any outbreak of water related diseases in Illinois, and this is true. However, I am persuaded by the expert testimony that the diseases caused by the pathogens in sewage are mostly of the kind, if not all of the kind, that are not likely to be reported, and if reported, are not likely to be diagnosed as a viral disease or even as a bacteriological disease related to water.

The expense and the time and the effort involved in identifying and isolating a virus which may have caused an infection in an individual who does present himself for medical treatment is so great that the effort is rarely undertaken. Therefore, I find that the absence of any reported outbreak of enteroviral diseases or of shigellosis or salmonellosis, or any of the other bacterial diseases, does not demonstrate that such diseases are not being contracted by residents of Illinois by reason of their exposure to waters of Lake Michigan which contain pathogens.

The diseases that are water-borne are generally not fatal diseases, but they are debilitating diseases. They are serious enough to be deemed a genuine health hazard and a legal nuisance. This is a value judgment, and perhaps someone else may feel that the symptoms of hepatitis and encephalitis and the other diseases shown by the record are not sufficient to constitute a nuisance. But that will be for someone else to say.

I feel that exposure to such diseases does warrant a legal remedy. The hazard is immediate, in that it is existing now. It existed yesterday. It will exist tomorrow. The defendants argue with considerable force that the mere possibility that an Illinois resident will contract a water-borne disease is insufficient to warrant the relief sought by the plaintiffs. They ask for the evidence of the actual outbreak of disease, the actual incidence of stomach aches and diarrhea and various symptoms which one might expect to find.

There are two problems with that approach. The first is that it is impossible to demonstrate that any particular disease contracted by any particular individual was contracted as a result of drinking water contaminated by reason of Milwaukee's

sewage. If the defendants want that kind of evidence, as they do, they will never receive it. It is impossible to produce.

The second problem with that approach is that it ignores the fact that exposure to a hazard, whether or not that exposure results in the actual contraction of a disease, is itself actionable. On the virtually undisputed evidence in this case, there is some degree of hazard to the residents of Illinois from Milwaukee's sewage. It is the degree of that hazard which is in dispute. Prevention is what public health is all about. Prevention is what equitable relief is all about, and it is not necessary to wait until an actual outbreak occurs to do something to prevent it. If you wait until it occurs, then, at least to that particular injury, you have waited too long.

There are some expressions in some of the cases which I think are pertinent, and I would like to read briefly from the case of *Missouri v. Illinois,* 180 U.S. 208, at pages 242 and 244. This case had to do with an effort by the State of Missouri to enjoin the City of Chicago from discharging its sewage to the river system and thereby allegedly polluting the Mississippi River. The position of the State of Illinois at this juncture of that particular litigation was that there had been no showing of any harm as yet, and the Supreme Court of the United States said:

> "In the first place, it is urged that the drawing by artificial means, of the sewage of the City of Chicago into the Mississippi River may or may not become a nuisance to the inhabitants, cities and towns of Missouri; that the injuries apprehended are merely eventual or contingent, and may, in fact, never be inflicted. Can it be gravely contended that there are no preventative remedies, by way of injunction or otherwise, against injuries not inflicted or experienced, but which would appear to be the natural result of acts of the defendant, which he admits or avows it to be his intention to commit?"

* * * *

> "The nature of equitable remedy in the case of public nuisances was well described by Mr. Justice Harlan speaking for the court in the case of *Mugler v. Kansas,* 123 U.S. 623, 673: 'The grounds of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual and permanent remedy than can be had at law. They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress and by perpetual injunction protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community.'"

Another case which is pertinent to this point is the case of *Harris Stanley Coal and Land Company v. Chesapeake and Ohio Railway Company,* 154 F. 2d 450, a case decided by the Court of Appeals for the Sixth Circuit. The court said at page 454:

> "Though no injury had yet been shown to have been incurred by the railroad, possible future injuries may be enjoined... (citations omitted) and suits are not premature because the plaintiff does not await an actual test of the results of a proposed or threatened act."

It seems to me that in some of the arguments the defendants have presented in this case, they have confused two things. One is the elements of the cause of action which the plaintiffs must prove, and the other is the standard of proof by which those elements must be proved. The defendants contend that the evidence must be clear and convincing. I am adopting that view for purposes of this case. The second question is: What must the clear and convincing evidence show? The defendants take the view that because the evidence must be clear

and convincing, it must show an actual injury. Otherwise, it is not clear and convincing. It is my view and my understanding of the law that what the plaintiffs must show by clear and convincing evidence is the existence of a hazard, whether or not that hazard has in fact eventuated in an injury. The hazard itself is the injury justifying injunctive relief in this kind of case.

I find from what I regard as clear and convincing evidence that the discharge of sewage by the defendants into Lake Michigan contitutes a health hazard of serious magnitude to the residents of the State of Illinois and that, unless enjoined by this court, that danger will continue to exist.

I turn now to the second phase of the case, that involving the matter of accelerated eutrophication of Lake Michigan.

I have no doubt whatever from the evidence in this case that the amount of phosphorus in Lake Michigan is increasing. No one knows how much phosphorus was in the lake 20 years ago, nobody knows how much phosphorus was in the lake yesterday; but what is clear from the evidence beyond any doubt is that when phosphorus is put into the lake, it stays there for a long time. It stays there either in solution in the water itself or in the bio-mass — the algae, the organisms, both animal and vegetable, which use phosphorus in their life cycles — or it is in the bottom sediments, from which it can be recycled, that is, put back into solution over time.

A lot of numbers were testified to in this case. I think the one that was the most impressive to me was the number 100. It takes 100 years for Lake Michigan to empty itself into Lake Huron. It is literally a cul-de-sac which can be victimized by mistreatment in a manner that other lakes and water courses of greater defensive capability cannot be victimized.

Lake Erie, which is considered by all to be a polluted lake, at least in its western basin, renews itself in three years, because it is a shallow lake and a much smaller lake than Lake Michigan. Yet, we have seen that in the lifetime of most of the people in this room, Lake Erie has gone from a lake that was described as

oligotrophic to one that is considered eutrophic and a source of serious concern to the persons who depend upon it.

I find that as a result of the inputs of phosphorus and other nutrients to Lake Michigan, the lake is undergoing accelerated eutrophication. Accelerated eutrophication is that eutrophicaton which is caused by man, as opposed to the eutrophication which occurs inevitably and naturally.

The evidence of the accelerated eutrophication is the decrease in dissolved silica, which I find is due to its utilization by diatoms; a decrease in the diatom population; and an increase in blue-green algae, both in the in-shore zone and the off-shore zone.

Dr. Shapiro's theory that the problem is caused or that the manifestations I have referred to, if they exist at all, are caused by alewives rather than by phosphorus, is, I think, a less likely and less reasonable explanation. I agree with Dr. Schelske that the more logical and natural explanation is that the phosphorus inputs from both point and non-point sources have caused these phenomena.

Accelerated eutrophication results in taste and odor problems in the lake water. In an advanced state, this odor problem can affect the use of the water for recreational purposes, and even in a less advanced stage, it can cause problems with drinking water. I was impressed by the fact that the City of Green Bay, Wisconsin, which is located right on Green Bay, does not get its drinking water from Green Bay. Instead, it goes clear across the Door Peninsula, a distance of 50 miles or more, and brings its drinking water from Lake Michigan. The reason, of course, is that Green Bay, a large embayment of the lake, does not offer drinking water of the quality desired by the residents of that city.

The reason it does not is that the southern portion of Green Bay has undergone accelerated eutrophication and is a eutrophic part of the lake.

In addition to the odor and taste problems caused by eutrophication, there is a loss of the clarity of the water, which is an aesthetic value important to many people, and I think rightly so. A secchi disc in Lake Superior can be seen at a depth of 60 feet. In Lake Michigan it can be seen at a depth of 10 to 15 feet only. Lake Superior is an ologotrophic lake. Lake Michigan is becoming a lake which exhibits the turbidity typical of lakes inhabited by increasing populations of algae.

The accelerated eutrophication caused by these nutrient inputs is far greater in the in-shore zone than it is in the off-shore zone, but there is no reason to believe that the eutrophication found in the in-shore zone will not spread, and, if not stopped, that it will not spread clear across the lake. That is the way it happened in Lake Erie. The in-shore zones began to exhibit manifestations of eutrophication. The confident predictions of various experts that the problem would remain there were not borne out by what actually occurred.

Lake Michigan, of course, is a bigger lake and a deeper lake. But I have heard nothing in this evidence to persuade me that there is any reason to believe that the same process will not occur in Lake Michigan, except it will take longer.

I find that the waters of Lake Michigan within the territorial boundaries of the State of Illinois are undergoing a process of accelerated eutrophication at the present time and that this process is caused by nutrient inputs, some of which emanate from the defendants. As has been pointed out by everyone in this case, there is no method of identifying any particular molecule of phosphorus or nitrogen or any other chemical as having come from a particular location. But because the waters of the in-shore zone interchange with each other and do mix longitudinally along the shore, it is a fact, both inferrable circumstantially and deducible as a matter of logic, that all inputs of nutrients along the western shore contribute to the accelerated eutrophication of the entire western shore line.

The benthic studies do not persuade me of anything either way. Dr. Otto was frank enough to admit that their purpose was

not to demonstrate the absence of any long-term eutrophication process. But neither did those studies convince me that there are not perceptible short-term changes.

The Fitzgerald cladophora study was effectively rebutted by the testimony of the witness Renz. In fact, I felt that the testimony of Dr. Fitzgerald, when viewed in the light of those jars of cladophora that Mr. Renz was able to collect with no effort, was misleading, to say the least.

Because of the interchange of water between the in-shore zone and the off-shore zone and the eventual mixing of the entire lake, the State of Michigan is exposed to injury and is being injured by the discharges of nutrients by these defendants.

There is no evidence of any present effect of Milwaukee discharges or, for that matter, of the effect of any other nutrient discharges, on fish life in the lake. It does not appear to me that the plaintiffs attempted to adduce such evidence. The matter was simply adverted to in passing from time to time, but the evidence was insufficient to prove that the disappearance of the whitefish or the lake trout or any of the fish species which are in trouble in Lake Michigan is caused by nutrient inputs. There is, however, evidence in the record from both sides that in-shore eutrophication is very likely to cause eventual problems with the spawning grounds of most of the types of fish which inhabit the lake. Therefore, in that sense I think that the matter of in-shore eutrophication is relevant to the question of fish, not presently, but in terms of a danger which definitely exists for the future.

There is no evidence that any specific algal problem or any specific taste and odor problem experienced by residents of Illinois or Michigan is attributable to Milwaukee's sewage as opposed to the nutrients discharged by any other point or non-point source. This, indeed, is the nature of this problem. It is not possible to segment nutrient inputs and ascribe this part to one source and another part to another source. All point and non-point sources combine to create the totality of nutrient inputs to the lake.

This case has to be looked at in a temporal way differently than the ordinary nuisance case is looked at. Some of the problems we may have in analyzing the facts of this case and applying the law to those facts arise from the difficulty of analogizing the situation involved here to the more typical nuisance situation. In this case we are concerned with an injury which is occurring in very small parts over a long period of time, a time not measurable by any specific finite event. It is measured in decades if not in centuries and if not in geologic time. Lake Michigan is a resource that will be relied upon by the people who reside in its basin for all time to come — for as long as this planet is inhabited by human beings — and, therefore, the parameters of a nuisance in regard to that lake must have a temporal aspect consistent with that long term human need for the use of that lake.

We have given some attention to the nature of the defendants in this case as being municipal corporations possibly identical with the sovereign state of Wisconsin. I think the nature of the plaintiffs is something that we should consider as well. This is not an individual plaintiff suing on behalf of himself of even representing a presently existing class. The plaintiffs here are states who represent people who are now living and generations to come, and those generations to come have interests which are every bit as important as the interests of those of us who are alive today. This is not simply an expression of a matter of philosophy. I believe it to be a statement of the law.

The defendants have frequently asked questions of witnesses couched in terms of whether there is any "measurable" effect on the lake caused by Milwaukee's discharges, or whether, if Milwaukee's discharges were altogether discontinued, there would be any "measurable" diminution in the amount of nutrients in the lake. The question really answers itself. It is impossible to measure accurately. It is possible only to estimate, and sometimes the estimates are not based upon empirical data but are really a kind of logical or mathematical analysis; but the fact that the inputs are not reasurable or the outtakes, if you will, would not be measurable in terms of their effect, does not mean that the effects do not ex-

ist, any more than the absence of someone to hear a tree fall in the forest means that it does not make a sound when it falls.

The defendants argue seriously and I believe sincerely that their discharges to the lake must be viewed in terms of the total discharges to the lake, both point and non-point, and that it is unfair to single them out, as they think has occurred in this case.

There was evidence produced as to the loadings to the lake. It has hardly satisfactory. The testimony of Dr. Zanoni as to point and non-point loadings I regard as altogether speculative and unreliable. He relied upon documents which, as it turned out, he had not even read, and when those documents were analyzed on their own merits, they turned out to have serious deficiencies. I give no credence to the Envirex material in regard to nutrient loadings to the lake. I think the Schelske estimate, while obviously subject to a great possibility of error either way, is nonetheless a more reliable kind of approach to the problem.

In any event, I believe that one million pounds of phosphorus from the treatment plants alone, without considering additional phosphorus discharged by the overflows, is a significant input to the lake, and its removal would be a significant removal. We know that Milwuakee is the biggest point source on the lake and that, of the total point sources on the lake, the Milwaukee discharges constitute a substantial percentage.

Now, does the fact that we have little or no ability to control non-point discharges to the lake means that we ought to ignore the point discharges? I think the answer to that is no. There is a statement contained in the case of *Barrett v. Mount Greenwood Cemetery Association,* 159 Ill. 385, 390, 42 N.E. 891 (1896), which I think is appropriate:

> "But we know of no rule of law that sanctions one wrong because another has preceded it. It is doubtless true that streams of water cannot be kept as pure when flowing through lands occupied by populous communities as when flowing through

> sparsely settled lands, but these effects that *unavoidably* arise from the occupation and cultivation of the soil by man do not justify the *deliberate* pollution of the stream of water flowing through another private property, in order that the interests of private persons, or even the public, may be enhanced thereby." (emphasis added.)

There is a second basic fallacy in the defendants' argument, I believe. There can be no doubt that the combined discharges of all point sources contribute substantially to the eutrophication of the lake. If any one point source can defend successfully on the ground that its discharge alone is not causing the problem and that without its discharge the problem would still exist, then that defense must be equally available to all point dischargers. We cannot have one law for Milwaukee and another law for Waukegan, the North Shore Sanitary District, Gary and Muskegon. The law must be uniform, especially since we are dealing with the federal common law of nuisance, which the United States Supreme Court has said is peculiarly adaptable for use in the solution of interstate water problems.

I believe the law is that one discharger who contributes an aliquot of a total combined discharge which causes a problem may be enjoined from continuing his discharge. Either that is true or it is impossible to enjoin point discharges. If Milwaukee is entitled to discharge raw sewage into the lake and insufficiently treated sewage into the lake on the magnitude of 320 million gallons a day or more during wet weather periods, then can anyone say to Waukegan, Illinois, with a discharge of 10 million gallons a day, that it may not do the same thing? In fact, I have not done the computations, but I would think that 10 million gallons of raw sewage from Waukegan each day would not equal the total nutrient loadings that are going into the lake from Milwaukee's treated effluent. So, if the rule contended for by the defendants were to be the law, it seems to me it would follow that Waukegan would be entitled to discharge raw sewage into Lake Michigan.

I hesitate to make this analogy because there are probably things wrong with it, but it seems to me that in a case of this kind, where one is not dealing with a finite point, either in space or in time, but rather with a continual process affecting a natural body of water the size of Lake Michigan, that the law of nuisance involving numerous polluters is very akin to the law applicable to joint tortfeasors. Each person who contributes to the injury is liable, not for the conduct of anyone else, but for his own conduct in that it forms part of the cause of the total injury.

So both on the basis that I feel the evidence shows Milwaukee's discharges are of themselves a significant cause of pollution to the lake and, secondly, because undeniably its contribution to the total nutrient discharges to the lake cannot be isolated out either factually or legally, I reject Milwaukee's defense based upon lack of measurable contribution.

Viewed in this light, the argument about balancing the equities is really difficult to apply. If the equities are balanced for Milwaukee, then they have to be balanced for everybody. If the equities favor Milwaukee because each dollar of expenditure for better sewage treatment cannot be shown to result in a specific amount of benefit to the lake, then those same equities favor every other point discharger to the lake.

I suppose there is a minimum level below which a discharge would be de minimis, even though, as a matter of pure logic, all discharges form part of the whole. But we are not dealing with a de minimis situation here. We are not dealing with a level so low that the theory of liability is stretched to its logical extreme.

I find from what I believe is clear and convincing evidence that the defendants' sewage discharges into Lake Michigan are presently contributing in a substantial way to the accelerated eutrophication of the in-shore zone of the western shore of Lake Michigan, including waters of Lake Michigan which are within the territorial boundaries of the State of Illinois.

I find further, on the basis of clear and convincing evidence, that due to the interchange of waters in the in-shore and off-shore zones, the defendants' discharges, if continued at anything like present levels, will substantially contribute to the accelerated eutrophication of Lake Michigan as a whole, including waters within the territorial boundaries of the States of Illinois and Michigan.

While it might be argued that the deleterious impact of eutrophication is of a far lesser magnitude than the danger presented by pathogens in the water, I believe that the results of eutrophication are serious enough to be an enjoinable nuisance. This is especially true when the countervailing right that is asserted is the right to discharge sewage, and sometimes raw sewage, into Lake Michigan.

I would like to discuss the defendants' argument that the Illinois discharges into Lake Michigan are somehow a defense to the defendants. First of all, it is a fact that most point sources in Illinois are now out of Lake Michigan. To say that the once-a-year discharge that is contemplated by the Waukegan plant of the North Shore Sanitary District is to be considered in the same light as Milwaukee's discharge of 320 million gallons a day, plus overflows, is not, I think, a valid argument.

The defendants cite the cases of *Missouri v. Illinois,* 200 US 496 (1906), and *New York v. New Jersey,* 256 U.S. 296 (1921). Neither of those cases is applicable to the facts we have here. In both of those cases, the evidence showed that the pollution of which plaintiff was complaining already existed by virtue of plaintiff's own activities. The waters which it was seeking to protect were already so polluted by its own discharge that it could truly be said that any activity of the defendants would not add materially to the condition.

In the case of *New York v. New Jersey,* New York was discharging raw sewage from its entire population into New York Bay, a badly polluted body of water, and it was seeking to enjoin the discharge of primary effluent, which had at least received primary treatment, by the State of New Jersey into the

same bay. Clearly, that situation is distinguishable from this one where we are dealing with a body of water that is still relatively clean, despite what I have said about the accelerated eutrophication existing in the in-shore and off-shore zones. Further degradation is not only a possibility in this case, it is a certainty unless the defendants' discharges are terminated.

Furthermore, this is a nuisance case. Contributory negligence is not involved. Negligence is not involved.

Illinois does discharge effluents to other water courses. We are not dealing with those other water courses. We are dealing with Lake Michigan, and if pollution of the Illinois River and the Mississippi River results from the discharges of Illinois effluent, that is not material to a disposition of this cause dealing with an altogether different body of water. In addition, I note that the discharges which have been referred to primarily in this connection are those of the Metropolitan Sanitary District and the North Shore Sanitary District. These effluents have received advanced treatment, and they are being discharged into water courses which may, for all I know, have different qualities as receiving bodies than does Lake Michigan.

But in any event, I find no conduct on the part of the State of Illinois or the State of Michigan that would in any way estop these plaintiffs from the relief they are seeking against the defendants.

For the foregoing reasons, the court finds the issues on the question of liability in favor of the plaintiffs and against the defendants on all three counts of the complaint.

On the matter of the remedy, the situation has to be analyzed in terms of wet weather flows and dry weather flows, or rather in terms of wet weather flows and all flows.

As far as the wet weather flows are concerned, the witnesses for both sides were in agreement that overflows of raw sewage to Lake Michigan cannot be tolerated and must cease. I find that to be the fact. Whether the defendants agree to it or not, the discharge of raw sewage into the lake must cease.

The defendants have been studying the problem for a long time. I believe that there is little, if any, need for further study on the general proposition of what approach should be taken to the elimination of the overflows. I believe that there has been unnecessary delay on the part of the defendants in addressing the matter of eliminating the overflows, in the combined system, the separate system, the separate municipal areas, and the Metropolitan Interceptor System.

I read much of the material in the Combined Sewer Overflow study, and I find in it no express commitment to the elimination of the overflows. What I find is reference to "control" of the overflows and "reduction" of overflows. It is not altogther clear to me that the Combined Sewer study starts with the proposition that the overflows must be eliminated.

I can save a lot of time, and I am going to save a lot of time in the event any further study of that issues is contemplated, because it will be and it is the ruling of this court that all overflows shall be eliminated.

As far as the method is concerned, I am not going to get into the sanitary engineering business yet, and I hope that I will never have to. From the evidence that I have heard, it seems to me the sensible thing to do is to collect, transport, and treat. The alternatives that are discussed seemed to me alternatives which long since should have been discarded as impracticable, and I truly wonder what purpose is served by any further temporizing about end of the pipe treatment or satellite treatment or any of the various possibilities that have been the subject of discussion.

It is time now for adoption of a particular method that will result in the elimination of these overflows. I believe that faced with the necessity for doing that, Dr. Katz can get the job done. I will say that he has from the outset of this case impressed me as a person who is knowledgeable and sincere, and I believe that he can do it if he is given the cooperation he is going to need.

If the decision is to transport and treat, the defendants are either going to have to build some additional treatment facilities on a rather large scale, or they are going to have to build some detention facilities. From the evidence I have heard, it appears to me that the latter is the less expensive and more practicable alternative; but again, I am not going to order any particular method to be employed at this time. I am interested in results. The methods are a matter of design.

Now, turning from the matter of the discharge of raw sewage to the matter of treatment of all flows, including present dry weather flows and those wet weather flows which will in the future be collected and treated, I do not have the slightest doubt, on the basis of the evidence I have heard here, that for the protection of the interests asserted by the plaintiffs here and to effectuate the decision of this court, advanced waste treatment is necessary. That treatment must consist of coagulation and filtration — not carbon filtration, but sand or multi-media filtration, as the design may dictate. The effluent standards that should be sought are 5 milligrams per liter of BOD and 5 milligrams per liter of suspended solids. Phosphorus of less than 1 milligram per liter should be sought, and I believe will be an inevitable consequence of the installation of the type of advanced treatment which is being ordered.

I am not going to enter any order today on the question of averages. I do not think I have enough information to make a definitive statement on it. The considerations involved in the two kinds of injury we have been discussing here are, of course, different. The public health aspect of the case really requires that there be no input into the lake of an effluent which has not been effectively chlorinated, and, therefore, I can tell you now that any geometric average is out. It is going to have to be an arithmetic average, but of what dimensions, I am not sure, and I will not attempt to say now.

On the eutrophication questions, on the other hand, an average would not hurt because it does not make any difference whether the pounds go in today or next week. If you have a limit of so many pounds a month, that will get the job done. But the

people of Illinois can be infected with viruses that result from one day or one hour of inadequate chlorination. The fact that there are no viruses on the other six days of the week reduces the exposure obviously, but it does not eliminate it to the extent it is possible to do so. And I believe that to the extent it is possible to do so, the law requires elimination of the hazard.

As far as the averages are concerned, I have the impression from Mr. Culp's testimony that the problem may take care of itself. He felt that Mr. Gupta's effluent standards really did not correlate very well with the treatment modes he was cost estimating, and it may be that the design the defendants come up with will, as in the case of Lake Tahoe, be sufficient to get effluent standards even below the 5 and 5 with no really remarkable peaks.

I have considered the possibility of appointing an engineer to work with the defendants. I believe I will not do that today. I am hopeful that the defendants will comply with the terms of this order without the necessity of any close supervision by this court. The extent to which they do so will be a matter of their good faith and their desire to conform.

As I had the pleasure of saying the other day, the counsel that have represented both sides in this case have been truly outstanding. If they continue during the time that lies ahead as they have in the past, I think that they can work out the details that are going to be necessary to put into effect the terms of this order within a reasonable time.

I will say that I believe time is a matter of importance. I will countenance no undue delay. On the other hand, I will be reasonable. I will not be oppressive. But the defendants must realize that they have a job to do and they must get about it.

I realize, too, that there will be an appeal in this case, and we will have to discuss the matter of a stay of execution at such time as that question arises.

The terms of this order are binding upon the defendants whether or not federal financial assistance becomes available. I hope that federal assistance is made available, but if it is not, the program decreed by this order must proceed nonetheless.

This brings us to the matter of cost, as to which there has been considerable controversy in this case. I think we should break it down into two things, because it is easy to get carried away by the huge numbers that have been bruited about. In my view, the cost of eliminating the overflows is not really a factor here. It is a cost that this order will undoubtedly cause to be incurred long before it would have been incurred, but the cost of eliminating those overflows would have had to have been borne by the City in any event at some time, unless, of course, it intended to ignore the opinions of its own expert witnesses to the effect that overflows are undesirable and must be eliminated. So whatever it costs to eliminate the overflows is not attributable to this lawsuit, except that this lawsuit has provided a catalyst for that expenditure.

Now, as to what is going to be involved in the cost of advanced waste treatment, I regard Mr. Gupta's figures, to the extent that they differ from those of Mr. Culp, as being wholly unfounded and speculative. When all is said and done, and when one finishes talking about the millions and tens of millions, it appears from Mr. Culp's testimony, and indeed from the testimony of the defendants' witness, Heaps. that what we are talking about here is something on the order of $2 a month per household in the District. Now, I do not mean to say that $2 per month per household is an insignificant or insubstantial amount, but what I do suggest is that it is in those terms that this obligation should be measured rather than in the forbidding and ominous numbers with the long trains of zeroes at the end.

The defendants argue, again sincerely, that this is a matter of priorities and they they have questions of how much they are going to spend on their police department and how much they are going to spend on their fire department, how much for schools, and that this is a matter of ordering priorities. I agree that matters involving schools, fire protection, police protec-

tion, public libraries, are perhaps matters for the people of Milwaukee and Milwaukee County to decide for themselves according to their own values and structure of priorities, because those are local matters. Any wrong decision will have a local impact only.

Here, however, we are dealing with activities that affect not simply the people who reside in Milwaukee County, but rather affect a body of water which those people share with residents of other states. And while Milwaukee has the right to order its own priorities and the right to decide its own values, it does not have the right to order the priorities of the residents of other states or to dictate to them what their values ought to be.

Now, I will hear from counsel on the question of when the timetable should be submitted. I have no idea how long it should take to prepare such a timetable.

What do you suggest, Mr. Moerke?

MR. MOERKE: Does the Court contemplate that timetable will be prior to September 9th?

THE COURT: Yes.

MR. MOERKE: I would assume that.

THE COURT: Yes, because the timetable will be incorporated in the judgment order by reference if not actual physical incorporation.

MR. MOERKE: If the Court please, I really have no reaction to that at this moment.

THE COURT: I did not know whether you would or not. I do not know either.

MR. MOERKE: I think I should consult with my clients.

THE COURT: All right. Mr. Karaganis, do you have any suggestion?

MR. KARAGANIS: I would suggest that Mr. Moerke be given an opportunity to consult with his experts, and we will be glad to sit down with Mr. Moerke and work it out.

THE COURT: Let's do this. Let's have the two things coincide. Have the timetable or your explanations as to why you have been unable to devise one by September 9th.

MR. MOERKE: All right.

THE COURT: We will enter the judgment order on that date and make any decision in regard to the timetable at the same time.

MR. MOERKE: If the Court please —

THE COURT: Yes, Mr. Moerke?

MR. MOERKE: Would the Court contemplate any time for possible motions that might be made by the defendants?

THE COURT: You are certainly entitled to make motions, Mr. Moerke. I would not want you to take any time to rehash what we have just spent —

MR. MOERKE: I understand.

THE COURT: — a long time doing, and I don't think in a bench trial, to preserve your record, you need to make a post-trial motion. I don't want any such motion to delay moving ahead with the case, but if you have any kind of motion you want to make, make it within the same time.

File it sometime before the 9th of September, and I will rule on that at the same time I rule on the judgment.

MR. MOERKE: All right, fine. Thank you.

(Which were all the proceedings had
on the day and date aforesaid.)

PEOPLE OF the STATE OF ILLINOIS, ex rel. William J. SCOTT, Attorney General of the State of Illinois, Plaintiff,

People of the State of Michigan, Intervening Plaintiff,

v.

CITY OF MILWAUKEE, WISCONSIN, et al., Defendants.

No. 72 C 1253

United States District Court,
N. D. Illinois, E. D.
Nov. 1, 1973.

MEMORANDUM OPINION AND ORDER

BAUER, District Judge.

This cause comes on the motion of the defendants City of Milwaukee, the Sewage Commission of the City of Milwaukee, the Metropolitan Sewage Commission of the County of Milwaukee, and the City of South Milwaukee to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

The plaintiff, the People of the State of Illinois, consists of the more than 11 million residents of Illinois, a sovereign state of the United States of America. Plaintiff alleges that it has a vital concern with matters of environmental quality affecting its air, land and water and in this regard has enacted comprehensive environmental legislation (the Illinois Environmental Protection Act of 1970, Ill.Rev.Stat.1971, Ch. 111½, §1001 et seq.), which legislation includes concern over pollution of the water of the State of Illinois, whether such pollution occurs as a

result of discharges within or outside of Illinois. The People of the State of Michigan join in this action as an intervening plaintiff.

The defendants, City of Milwaukee, City of Kenosha, City of Racine, City of South Milwaukee are municipalities incorporated under the laws of the State of Wisconsin, political subdivisions thereof, and hence citizens of that State; the defendant Sewage Commission of the City of Milwaukee is charged by law with the duty of collecting, transmitting and disposing of the City's sewage; while the defendant Metropolitan Sewage Commission of the County of Milwaukee has the responsibility for the transmission, treatment, and disposal of sewage from territory located within its drainage area.

The plaintiff in the complaint alleges that the People of the State of Illinois are being injured by the defendant's practice of depositing raw sewage in Lake Michigan thereby causing pollution of Illinois' territorial waters of Lake Michigan. The plaintiff seeks an injunction against defendants prohibiting the complained of practice. This action is based on a federal question and diversity of citizenship jurisdiction pursuant to §§1331(a) and 1332. The plaintiff, in its complaint, alleges an action based on: (1) federal common law nuisance involving interstate waters; (2) violations of the Illinois Environmental Protection Act, 111½ Ill.Rev.Stat. §1001; and (3) state common law nuisance. The Supreme Court of the United States has previously declined to exercise jurisdiction in this cause, holding that pollution of interstate or navigable water could be abated under a federal common law claim based on nuisance and that such action was one "arising under" the laws of the United States within the meaning of 28 U.S.C. §1331(a) and within the jurisdiction of the federal district courts. Illinois v. Milwaukee, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1927).

The defendants, in support of their instant motion, contend that the federal common law nuisance action has been preempted by the Federal Water Pollution Control Act, 33 U.S.C. §1151, et seq., as amended by P.L. 92-500, October 18, 1972. The plaintiff in opposition to the instant motion contends

that the instant cause of action has not been preempted by the 1972 amendments to the Federal Water Pollution Control Act (Water Pollution Prevention and Control Act of 1972, 33 U.S.C. §1251, et seq., P.L. 92-500).

It is the opinion of this Court that the defendants' motion is without merit.

I. THE FEDERAL WATER POLLUTION CONTROL ACT, 33 U.S.C. §1551, et seq., AS AMENDED BY P.L. 92-500, OCTOBER 18, 1972 DOES NOT PREEMPT THE STATE OF ILLINOIS' RIGHT TO SEEK ABATEMENT IN FEDERAL DISTRICT COURT OF A FEDERAL COMMON LAW NUISANCE IN INTERSTATE OR NAVIGABLE WATERS.

A. *Pre-1972 Amendments*

To properly understand the historical development of the 1972 amendments to the Federal Water Pollution Control Act, one must first examine the status of the law as it existed prior to those amendments. Prior to the 1972 amendments, the Supreme Court and other courts repeatedly rejected the contention that the Federal Water Pollution Control Act preempted the right of states to seek common law nuisance relief from water pollution in state or federal courts. This consistent rejection was made in response to the specific argument that the Federal Water Pollution Control Act was a congressional attempt to create a comprehensive and uniform federal control program. See Illinois v. Milwaukee, *supra;* Ohio v. Wyandotte Chemical Company, 401 U.S. 49, 91 S.Ct. 1005, 28 L.Ed.2d 256 (1971); United States v. Bushey, 346 F.Supp. 145 (D.C.Vt.1972).

The application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with the Federal Water Pollution Control Act. Illinois v. Milwaukee, *supra.* The federal scheme is not pre-emptive of state action. Section 1(b) of the Federal Water Pollution Control Act declares that the policy of Congress is to recognize,

preserve, and protect the primary responsibilities and rights of the states in preventing and controlling water pollution, 33 U.S.C. §1151(b) (1970 ed.). Section 10 of that act provides that except where the Attorney General has actually obtained a court order of pollution abatement on behalf of the United States, "State and interstate action to abate polution of . . . navigable waters . . . shall not, . . . be displaced by Federal enforcement action," 33 U.S.C. §1160(b) (1971 ed.). The Environmental Quality Improvement Act of 1970, 84 Stat. 114, 42 U.S.C. §4371 (1970 ed.), while stating the general policy of Congress is protecting the environment, also states: "the primary responsibility for implementing this policy rests with State and local governments" 42 U.S.C. §4371(b)(2) (1970 ed.). Under federal law in 1970, states did indeed have primary responsibility for setting water quality standards; the federal agencies only set water quality standards for a state if the state defaulted. 33 U.S.C. §1160(c) (1970 ed.).

Where Congress specifically intends that its exercise of statutory powers should preempt all other remedies it has expressly so stated that it is preempting such remedies. For example, 33 U.S.C. §1163(f) expressly prohibits action beyond the terms of the Federal Water Pollution Control Act with respect to the regulation of marine sanitation devices. In contrast, other sections of the Federal Water Pollution Control Act, e.g. 33 U.S.C. §§1151(b), 1151(c), indicate that much residual authority was left apart from the provisions of the Federal Water Pollution Control Act.[1]

B. *The 1972 Amendments*

An analysis of the 1972 amendments of the Federal Water Pollution Control Act clearly shows that Congress in no way in-

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[1] Similarly, the Supreme Court, in construing the Clean Air Act, 42 U.S.C. §1857, et seq., has held that statutory preemption only exists where Congress has explicitly so stated; and that non-statutory remedies such as federal common law nuisances exist where there has been no express preemption. See Washington v. General Motors Corp., 406 U.S. 109, 92 S.Ct. 1396, 31 L.Ed.2d 727 (1972).

tended to destroy any remedies available to the states prior to the passage of the 1972 amendments. Thus, in §101(b), the Congress adopts a statement very similar to that which previously existed in 33 U.S.C. §1151(b):

> "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce and eliminate pollution."

In addition, the 1972 amendments adopted a provision similar to 33 U.S.C. §1151(c). Specifically §510 of the 1972 amendments states:

> "Except as expressly provided in this chapter nothing . . . shall . . . (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

Nowhere do the 1972 amendments express any intention of eliminating the rights of the states to seek common law nuisance protection either in the state or federal courts, as enunciated in Ohio v. Wyandotte Chemical Co., *supra,* and Illinois v. Milwaukee, *supra.*

Moreover, Congress was very explicit in the 1972 amendments where it intended to preempt state authority and to make the statutory structure of the amendments the exclusive remedial scheme. Thus, Section 312(f)(1) of the 1972 amendments expressly prohibits any state action with regard to the regulation of marine sanitation devices. If Congress had intended to preempt the common law rights of the states under the *Milwaukee* doctrine, it surely would have expressly stated such intent in the act and would not have utilized the language contained in Section 101(b) and Section 510(2). Further, it is well settled that statutes will not be construed in derogation of common law unless such intent is clear from the words of the statute. Isbrandtsen v. Johnson, 343 U.S. 779, 72 S.Ct. 1011, 96 L.Ed. 1294 (1952). It is clear that the 1972 amendments to the

Federal Water Pollution Control Act did not and were not intended to preempt actions based on federal common law nuisances.

II. REGULATIONS PROMULGATED BY THE ENVIRONMENTAL PROTECTION AGENCY DO NOT DEMONSTRATE THE PREEMPTION OF ANY FEDERAL COMMON LAW RIGHT.

The defendants contend that the promulgation of two recent regulations, namely 40 C.F.R. 125 and 40 C.F.R. 130, by the Environmental Protection Agency preempts the federal common law right to bring a nuisance action for the pollution of interstate waters. More specifically, the defendants contend that at the time *Milwaukee* doctrine was predicated there were no existing standards or regulations capable of preempting federal common law action; however, the recent promulgation by the Environmental Protection Agency of two regulations now set up a uniform federal law which preempts federal common law rights.

Contrary to the defendants' contention, detailed and complex regulations governing water quality and waste discharges and permits existed under the pre-1972 Federal Water Pollution Control Act, 33 U.S.C. §1151, et seq.[2]

Despite the existence of these regulations and the statutory provisions of the pre-1972 Federal Water Pollution Control Act, the United States Supreme Court held that these regulations and statutes did not preempt the common law nuisance ac-

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[2] See, e.g., the Joint Permit Program of the U.S. Environmental Protection Agency and the Army Corps of Engineers, 36 F.R. 6564, et seq., April 1, 1971.

tion. Illinois v. Milwaukee, *supra,* 406 U.S. at 103, 92 S.Ct. 1385.[3]

There is much concern over the fact that in spite of the arsenal of federal power little is being done about water pollution.[4] That, of course, is not the issue before this Court. However, it is clear that the central issue raised by the instant motion is whether state action is preempted by federal law and regulations, and thus whether the protection of interstate waters has been left solely to the federally enacted statutes and standards.

Given the express intention of Congress to allow the states to establish tougher standards of performance it would seem illogical to argue that Congress intended the states to be bound solely by federal standards. The purpose of the Federal Water Pollution Control Act and its 1972 amendments was not to preempt but to supplement and amplify any pre-existing remedies. United States v. Bushey, 363 F.Supp. 110 (D.Vt. August 21, 1973). Consequently, the defendants' instant motion should be denied.

Accordingly, it is hereby ordered that the defendants' motion to dismiss is denied.

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[3] Similarly the defendants' view of the restrictions of §510 is inaccurate. While §510 prohibits the states from adopting less stringent or easier standards of performance, §510 was expressly intended to allow states to require more stringent or tougher standards of performance than required by the federal government. The House-Senate Conference Committee specifically states:

> "Section 510 provides that States, political subdivisions, and interstate agencies retain the right to set more restrictive standards and limitations than those imposed under this Act." *"Joint Explanatory Statement of the Committee of Conference"*, 92-1326, 1972 U.S.Code Cong. and Admin. News, Vol. 11, p.3776 at 3825.

[4] See Polikoff, "The Interlake Affair," Wash.Monthly, Vol. 3, No. 1, p. 7 (Mar. 1971).

PEOPLE OF the STATE OF ILLINOIS, ex rel. William J. SCOTT, Attorney General of the State of Illinois, Plaintiff,

People of the State of Michigan, Intervening Plaintiff,

v.

CITY OF MILWAUKEE, WISCONSIN, et al., Defendants.

No. 72 C 1253

United States District Court,
N. D. Illinois, E. D.
Nov. 16, 1972.

MEMORANDUM OPINION AND ORDER

BAUER, J.:

This cause comes on the motions of defendants City of Milwaukee and Sewerage Commission of the City of Milwaukee and of defendant Metropolitan Sewerage Commission of the County of Milwaukee to quash service of process and dismiss the action for lack of personal jurisdiction over these defendants and for improper venue.

Plaintiff, the State of Illinois ("Illinois"), charging that its residents are being injured by defendants' alleged practice of depositing raw sewage in Lake Michigan and of thereby causing pollution of Illinois' territorial waters of Lake Michigan, seeks an injunction against defendants prohibiting this practice. The action, founded upon both federal question and diversity jurisdiction, pursuant to 28 U.S.C. §§1331(a) and 1332, alleges (1) federal common law nuisance involving interstate waters, (2) violations of the Illinois Environmental Protection Act, 111 1/2

Ill. Rev. Stat. §1001, and (3) state common law nuisance. The Supreme Court previously declined to exercise jurisdiction in this cause, stating that the action would lie in the appropriate federal district court, pursuant to 28 U.S.C. §1331(a), as a cause of action under the federal common law of nuisance since the dispute involved interstate waters.[1]

The principal grounds of the instant motions are those of personal jurisdiction and venue. Defendants content (1) that, as municipal corporations, they are not susceptible to service of process from an out-of-state court and (2) that, since this action is not founded solely in diversity, under the provisions of 28 U.S.C. §1391(b) it should be brought only in the judicial district wherein all defendants reside.

With respect to this Court's jurisdiction over these defendants, the Court notes that personal service of process was effected pursuant to the Illinois long-arm statute, 110 Ill. Rev. Stat. §17. Not only is that statute applicable where diversity jurisdiction is alleged (here, in Counts II and III of the Complaint), but it has been held applicable also in cases involving federal question jurisdiction. See, e.g., *Metropolitan Sanitary District of Greater Chicago v. General Electric Co.*, 35 F.R.D. 131 (N.D. Ill. 1964).

The constitutional arguments raised by defendants in contesting the use of long-arm service in the instant case are readily overcome. The constitutionality of the Illinois statute has been upheld on the basis that due process requirements are met if defendants, having minimum contacts with the State, "incur obligations to those entitled to the State's protection." *Nelson v. Miller,* 11 Ill.2d 378, 389 (1957). Furthermore, when defendant can reasonably contemplate that his product will eventually reach the forum state where the injury occurred, he has established sufficient contacts with that state. *Gray v. American Radiator and Standard Sanitary Corp.*, 22 Ill.2d 432 (1961);

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[1] *Illinois v. City of Milwaukee,* _____ U.S. _____, 92 S.Ct. 1385 [4 ERC 1001] (April 24, 1972).

Anderson v. Penncraft Tool Co., 200 F.Supp. 145 (N.D. Ill. 1961). Since these defendants could reasonably contemplate that the sewage which they discharge would eventually reach Illinois territorial waters of Lake Michigan, which is the situs of the alleged injury to plaintiff, this Court holds that the service of process pursuant to the Illinois long-arm statute was valid.

Defendants attempt to buttress their arguments against personal jurisdiction of this Court through assertions that actions against them are inherently local in nature. However, it is clear that where the relief sought is injunctive and pertaining specifically to the named defendants, as here, the action is transitory. Thus, these defendants must be subject to personal jurisdiction of this Court.

The appropriate portion of the venue statute, 28 U.S.C. §1391(b) provides that:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

Contesting the venue of this Court, defendants cite numerous cases for the proposition that the appropriate venue for this action is the district in which all defendants reside, the Eastern District of Wisconsin. However, all but one of these cases was decided prior to the enactment of the 1966 amendment to §1391(b), which added the words "or in which the claim arose"; thus, such authority need not be considered. The remaining case, *Cole v. Trustees of Columbia University,* 300 F.Supp. 1026 (S.D. N.Y. 1969), was concerned primarily with overriding governmental policy in not subjecting Senate subcommittee members to suit in any federal district court in the county. Since this case cannot imply such far-reaching consequences, this Court is not bound by *Cole* in its determination of venue. Following the Supreme Court's observation in footnote 19 of its opinion in the instant case, *supra,* that this action may be brought only "in the judicial district where all defendants

reside, or in which the claim arose," 28 U.S.C. §1391(b), thereby giving flexibility to the choice of venue," this Court concludes that venue in the United States District for the Northern District of Illinois is appropriate. The claim of plaintiff arose in the Northern District of Illinois, where the injury occurred. See *Gray v. American Radiator and Standard Sanitary Corp., supra.*

Accordingly, it is hereby ordered that defendants' motions to quash service of process and to dismiss are denied.

ILLINOIS *v.* CITY OF MILWAUKEE, WISCONSIN, ET AL.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 49, Orig. Argued February 29, 1972—Decided April 24, 1972

Fred F. Herzog argued the cause for plaintiff. With him on the briefs was *William J. Scott*, Attorney General of Illinois.

Harry G. Slater argued the cause for defendants. With him on the brief for defendant City of Milwaukee were *John J. Fleming* and *Richard F. Maruszewski*. *Michael S. Fisher* and *Burton A. Scott* filed a brief for defendant City of Kenosha. *Jack Harvey*, *Edward A. Krenzke*, and *Louis J. Roshar* filed a brief for defendant City of Racine. *Mr. Fleming* and *Harvey G. Odenbrett* filed a brief for defendant Sewerage Commission of the City of Milwaukee. *Ewald L. Moerke, Jr.*, filed a brief for defendant Metropolitan Sewerage Commission of the County of Milwaukee.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a motion by Illinois to file a bill of complaint under our original jurisdiction against four cities of Wisconsin, the Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee. The cause of action alleged is pollution by the defendants of Lake Michigan, a body of interstate water. According to plaintiff, some 200 million gallons of raw or inadequately treated sewage and other waste materials are discharged daily into the lake in the Milwaukee area alone. Plaintiff alleges that it and its subdivisions prohibit and prevent such discharges, but that the defendants do not take such actions. Plaintiff asks that we abate this public nuisance.

I

Article III, § 2, cl. 2, of the Constitution provides: "In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction." Congress has provided in 28 U. S. C. § 1251 that "(a) the Supreme Court shall have original and exclusive jurisdiction of: (1) All controversies between two or more States."

It has long been this Court's philosophy that "our original jurisdiction should be invoked sparingly." *Utah* v. *United States*, 394 U. S. 89, 95. We construe 28 U. S. C. § 1251 (a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We

incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer. *Washington* v. *General Motors Corp.*, *post*, p. 109.

Illinois presses its request for leave to file saying that the agencies named as defendants are instrumentalities of Wisconsin and therefore that this is a suit against Wisconsin which could not be brought in any other forum.

Under our decisions there is no doubt that the actions of public entities might, under appropriate pleadings, be attributed to a State so as to warrant a joinder of the State as party defendant.

In *Missouri* v. *Illinois*, 180 U. S. 208, Missouri invoked our original jurisdiction by an action against the State of Illinois and the Sanitary District of the City of Chicago, seeking an injunction to restrain the discharge of raw sewage into the Mississippi River. On a demurrer to the motion for leave to file a bill of complaint, Illinois argued that the Sanitary District was the proper defendant and that Illinois should not have been made a party. That argument was rejected:

> "The contention . . . seems to be that, because the matters complained of in the bill proceed and will continue to proceed from the acts of the Sanitary District of Chicago, a corporation of the State of Illinois, it therefore follows that the State, as such, is not interested in the question, and is improperly made a party.
>
> "We are unable to see the force of this suggestion. The bill does not allege that the Sanitary District is acting without or in excess of lawful authority. The averment and the conceded facts are that the corporation is an agency of the State to do the very things which, according to the theory of the complainant's case, will result in the mischief to be ap-

prehended. It is state action and its results that are complained of—thus distinguishing this case from that of *Louisiana* v. *Texas* [176 U. S. 1], where the acts sought to be restrained were alleged to be those of officers or functionaries proceeding in a wrongful and malevolent misapplication of the quarantine laws of Texas. The Sanitary District of Chicago is not a private corporation, formed for purposes of private gain, but a public corporation, whose existence and operations are wholly within the control of the State.

"The object of the bill is to subject this public work to judicial supervision, upon the allegation that the method of its construction and maintenance will create a continuing nuisance, dangerous to the health of a neighboring State and its inhabitants. Surely, in such a case, the State of Illinois would have a right to appear and traverse the allegations of the bill, and, having such a right, might properly be made a party defendant." 180 U. S., at 242.

In *New York* v. *New Jersey*, 256 U. S. 296, the State of New York brought an original action against the State of New Jersey and the Passaic Valley Sewerage Commissioners, seeking an injunction against the discharge of sewage into Upper New York Bay. The question was whether the actions of the sewage agency could be attributed to New Jersey so as to make that State responsible for them. The Court said:

"Also, for the purpose of showing the responsibility of the State of New Jersey for the proposed action of the defendant, the Passaic Valley Sewerage Commissioners, the bill sets out, with much detail, the acts of the legislature of that State authorizing and directing such action on their part.

> "Of this it is sufficient to say that the averments of the bill, quite undenied, show that the defendant sewerage commissioners constitute such a statutory, corporate agency of the State that their action, actual or intended, must be treated as that of the State itself, and we shall so regard it." 256 U. S., at 302.

The most recent case is *New Jersey* v. *New York*, 345 U. S. 369. The action was originally brought by the State of New Jersey against the City and State of New York for injunctive relief against the diversion of waters from Delaware River tributaries lying within New York State. Pennsylvania was subsequently allowed to intervene. The question presented by this decision was the right of the City of Philadelphia also to intervene in the proceedings as a party plaintiff. The issues raised were broad:

> "All of the present parties to the litigation have formally opposed the motion to intervene on grounds (1) that the intervention would permit a suit against a state by a citizen of another state in contravention of the Eleventh Amendment; (2) that the Commonwealth of Pennsylvania has the exclusive right to represent the interest of Philadelphia as *parens patriae;* and (3) that intervention should be denied, in any event, as a matter of sound discretion." 345 U. S., at 372.

We denied the City of Philadelphia's motion to intervene, saying:

> "The City of Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River and its tributaries and depend upon those waters. If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an

intramural dispute over the distribution of water within the Commonwealth. . . .

"Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions. An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." 345 U. S., at 373.

We added:

"The presence of New York City in this litigation is urged as a reason for permitting Philadelphia to intervene. But the argument misconstrues New York City's position in the case. New York City was not admitted into this litigation as a matter of discretion at her request. She was forcibly joined as a defendant to the original action since she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey. Because of this position as a defendant, subordinate to the parent state as the primary defendant, New York City's position in the case raises no problems under the Eleventh Amendment." 345 U. S., at 374–375.

We conclude that while, under appropriate pleadings, Wisconsin could be joined as a defendant in the present controversy, it is not mandatory that it be made one.

It is well settled that for the purposes of diversity of citizenship, political subdivisions are citizens of their respective States.[1] *Bullard* v. *City of Cisco*, 290 U. S. 179;

[1] It is equally well settled that a suit between a State and a citizen of another State is not a suit between citizens of different States for the purposes of diversity of citizenship jurisdiction. *Postal Telegraph Cable Co.* v. *Alabama*, 155 U. S. 482, 487.

Cowles v. *Mercer County*, 7 Wall. 118, 122. If a political subdivision is a citizen for diversity purposes, then it would make no jurisdictional difference whether it was the plaintiff or defendant in such an action. That being the case, a political subdivision in one State would be able to bring an action founded upon diversity jurisdiction against a political subdivision of another State.

We therefore conclude that the term "States" as used in 28 U. S. C. § 1251 (a)(1) should not be read to include their political subdivisions. That, of course, does not mean that political subdivisions of a State may not be sued under the head of our original jurisdiction, for 28 U. S. C. § 1251 provides that "(b) the Supreme Court shall have original but not exclusive jurisdiction of: (3) all actions or proceedings by a State against the citizens of another State . . . ."

If the named public entities of Wisconsin may, however, be sued by Illinois in a federal district court, our original jurisdiction is not mandatory.

It is to that aspect of the case that we now turn.

II

Title 28 U. S. C. § 1331 (a) provides that "[t]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

The considerable interests involved in the purity of interstate waters would seem to put beyond question the jurisdictional amount provided in § 1331 (a). See *Glenwood Light & Water Co.* v. *Mutual Light, Heat & Power Co.*, 239 U. S. 121; *Mississippi & Missouri R. Co.* v. *Ward*, 2 Black 485, 492; *Ronzio* v. *Denver & R. G. W. R. Co.*, 116 F. 2d 604, 606; C. Wright, The Law of Federal Courts 117–119 (2d ed. 1970); Note, 73 Harv. L. Rev. 1369.

The question is whether pollution of interstate or navigable waters creates actions arising under the "laws" of the United States within the meaning of § 1331(a). We hold that it does; and we also hold that § 1331 (a) includes suits brought by a State.

MR. JUSTICE BRENNAN, speaking for the four members of this Court in *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 393 (dissenting and concurring), who reached the issue, concluded that "laws," within the meaning of § 1331 (a), embraced claims founded on federal common law:

> "The contention cannot be accepted that since petitioner's rights are judicially defined, they are not created by 'the laws . . . of the United States' within the meaning of § 1331 . . . . In another context, that of state law, this Court has recognized that the statutory word 'laws' includes court decisions. The converse situation is presented here in that federal courts have an extensive responsibility of fashioning rules of substantive law . . . . These rules are as fully 'laws' of the United States as if they had been enacted by Congress." (Citations omitted.)

Lower courts have reached the same conclusion. See, *e. g.*, *Murphy* v. *Colonial Federal Savings & Loan Assn.*, 388 F. 2d 609, 611–612 (CA2 1967); *Stokes* v. *Adair*, 265 F. 2d 662 (CA4 1959); *Mater* v. *Holley*, 200 F. 2d 123 (CA5 1952); American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 180–182 (1969).

Judge Harvey M. Johnsen in *Texas* v. *Pankey*, 441 F. 2d 236, 240, stated the controlling principle:

> "As the field of federal common law has been given necessary expansion into matters of federal concern and relationship (where no applicable fed-

eral statute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside the State's own territory, now would and should, we think, be held to be a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States."

Chief Judge Lumbard, speaking for the panel in *Ivy Broadcasting Co.* v. *American Tel. & Tel. Co.*, 391 F. 2d 486, 492, expressed the same view as follows:

"We believe that a cause of action similarly 'arises under' federal law if the dispositive issues stated in the complaint require the application of federal common law . . . . The word 'laws' in § 1331 should be construed to include laws created by federal judicial decisions as well as by congressional legislation. The rationale of the 1875 grant of federal question jurisdiction—to insure the availability of a forum designed to minimize the danger of hostility toward, and specially suited to the vindication of, federally created rights—is as applicable to judicially created rights as to rights created by statute." (Citations omitted.)

We see no reason not to give "laws" its natural meaning, see *Romero* v. *International Terminal Operating Co.*, *supra*, at 393 n. 5 (BRENNAN, J., dissenting and concurring), and therefore conclude that § 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.

As respects the power of a State to bring an action under § 1331 (a), *Ames* v. *Kansas*, 111 U. S. 449, 470–472, is controlling. There Kansas had sued a number of corporations in its own courts and, since federal rights were involved, the defendants had the cases removed to the federal court. Kansas resisted, saying that the federal court lacked jurisdiction because of Art. III,

§ 2, cl. 2, of the Constitution, which gives this Court "original Jurisdiction" in "all Cases . . . in which a State shall be Party." The Court held that where a State is suing parties who are not other States, the original jurisdiction of this Court is not exclusive (*id.*, at 470) and that those suits "may now be brought in or removed to the Circuit Courts [now the District Courts] without regard to the character of the parties." [2] *Ibid.* We adhere to that ruling.

III

Congress has enacted numerous laws touching interstate waters. In 1899 it established some surveillance by the Army Corps of Engineers over industrial pollution, not including sewage, Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, a grant of power which we construed in *United States* v. *Republic Steel Corp.*, 362 U. S. 482, and in *United States* v. *Standard Oil Co.*, 384 U. S. 224.

The 1899 Act has been reinforced and broadened by a complex of laws recently enacted. The Federal Water Pollution Control Act, 62 Stat. 1155, as amended, 33 U. S. C. § 1151, tightens control over discharges into navigable waters so as not to lower applicable water quality standards. By the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*, Congress "authorizes and directs" that "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act" and that "all agencies of the Federal Government shall . . . identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values

[2] See also H. R. Rep. No. 308, 80th Cong., 1st Sess., A 104 (1947): "The original jurisdiction conferred on the Supreme Court by Article 3, section 2, of the Constitution is not exclusive by virtue of that provision alone. Congress may provide for or deny exclusiveness."

may be given appropriate consideration in decisionmaking along with economic and technical considerations." Sec. 102, 42 U. S. C. § 4332. Congress has evinced increasing concern with the quality of the aquatic environment as it affects the conservation and safeguarding of fish and wildlife resources. See, *e. g.*, Fish and Wildlife Act of 1956, 70 Stat. 1119, 16 U. S. C. § 742a; the Act of Sept. 22, 1959, 73 Stat. 642, authorizing research in migratory marine game fish, 16 U. S. C. § 760e; and the Fish and Wildlife Coordination Act, 48 Stat. 401, as amended, 16 U. S. C. § 661.

Buttressed by these new and expanding policies, the Corps of Engineers has issued new Rules and Regulations governing permits for discharges or deposits into navigable waters. 36 Fed. Reg. 6564 *et seq.*

The Federal Water Pollution Control Act in § 1 (b) declares that it is federal policy "to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution." But the Act makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters.[3] While the States are given time to establish water quality standards, § 10 (c)(1), if a State fails to do so the federal administrator[4] promulgates one. § 10 (c)(2). Section 10 (a) makes pollution of interstate or navigable waters subject "to abatement" when it "endangers the health or welfare of any persons."

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[3] The contrary indication in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493, 498 n. 3, was based on the preoccupation of that litigation with public nuisance under Ohio law, not the federal common law which we now hold is ample basis for federal jurisdiction under 28 U. S. C. § 1331 (a).

[4] The powers granted the Secretary of the Interior under the Federal Water Quality Act of 1965, 79 Stat. 903, were assigned by the President to the Administrator of the Environmental Protection Agency pursuant to Reorganization Plan No. 3 of 1970. See 35 Fed. Reg. 15623.

The abatement that is authorized follows a long-drawn-out procedure unnecessary to relate here. It uses the conference procedure, hoping for amicable settlements. But if none is reached, the federal administrator may request the Attorney General to bring suit on behalf of the United States for abatement of the pollution. § 10 (g).

The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available. "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 457. When we deal with air and water in their ambient or interstate aspects, there is a federal common law,[5] as *Texas* v. *Pankey*, 441 F. 2d 236, recently held.

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[5] While the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning such rules of decision. What we said in another connection in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 456–457, is relevent here:

"The question then is, what is the substantive law to be applied in suits under § 301 (a)? We conclude that the substantive law to apply in suits under § 301 (a) is federal law, which the courts must fashion from the policy of our national labor laws. The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. Federal interpretation of the federal law will govern, not state law. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights." (Citations omitted.) See also Woods & Reed, The Supreme Court and Interstate Environmental Quality: Some Notes on the *Wyandotte* Case, 12 Ariz. L. Rev. 691, 713–714; Note, 56 Va. L. Rev. 458.

The application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with the Water Pollution Control Act. Congress provided in § 10 (b) of that Act that, save as a court may decree otherwise in an enforcement action, "[s]tate and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not . . . be displaced by Federal enforcement action."

The leading air case is *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, where Georgia filed an original suit in this Court against a Tennessee company whose noxious gases were causing a wholesale destruction of forests, orchards, and crops in Georgia. The Court said:

> "The caution with which demands of this sort, on the part of a State, for relief from injuries analogous to torts, must be examined, is dwelt upon in *Missouri* v. *Illinois*, 200 U. S. 496, 520, 521. But it is plain that some such demands must be recognized, if the grounds alleged are proved. When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court. *Missouri* v. *Illinois*, 180 U. S. 208, 241." 206 U. S., at 237.

The nature of the nuisance was described as follows:

> "It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that

> the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law." *Id.*, at 238.

Our decisions concerning interstate waters contain the same theme. Rights in interstate streams, like questions of boundaries, "have been recognized as presenting federal questions." [6] *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 110. The question of apportionment of interstate waters is a question of "federal common law" upon which state statutes or decisions are not conclusive.[7] *Ibid.*

In speaking of the problem of apportioning the waters of an interstate stream, the Court said in *Kansas* v. *Colorado*, 206 U. S. 46, 98, that "through these successive disputes and decisions this court is practically building up what may not improperly be called interstate com-

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[6] Thus, it is not only the character of the parties that requires us to apply federal law. See *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237; cf. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 289; The Federalist No. 80 (A. Hamilton). As Mr. Justice Harlan indicated for the Court in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 421–427, where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law. See also *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447; C. Wright, The Law of Federal Courts 249 (2d ed. 1970); Woods & Reed, *supra*, n. 5, at 703–713; Note, 50 Texas L. Rev. 183. Certainly these same demands for applying federal law are present in the pollution of a body of water such as Lake Michigan bounded, as it is, by four States.

[7] Those who maintain that state law governs overlook the fact that the *Hinderlider* case was written by Mr. Justice Brandeis who also wrote for the Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, the two cases being decided the same day.

mon law." And see *Texas* v. *New Jersey*, 379 U. S. 674 (escheat of intangible personal property), *Texas* v. *Florida*, 306 U. S. 398, 405 (suit by bill in the nature of interpleader to determine the true domicile of a decedent as the basis of death taxes).

Equitable apportionment of the waters of an interstate stream has often been made under the head of our original jurisdiction. *Nebraska* v. *Wyoming*, 325 U. S. 589; *Kansas* v. *Colorado*, *supra*; cf. *Arizona* v. *California*, 373 U. S. 546, 562. The applicable federal common law depends on the facts peculiar to the particular case.

> "Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made." 325 U. S., at 618.

When it comes to water pollution this Court has spoken in terms of "a public nuisance," [8] *New York* v. *New Jer-*

[8] In *North Dakota* v. *Minnesota*, 263 U. S. 365, 374, the Court said:

"[W]here one State, by a change in its method of draining water from lands within its border, increases the flow into an interstate stream, so that its natural capacity is greatly exceeded and the water is thrown upon the farms of another State, the latter State has such an interest as quasi-sovereign in the comfort, health and prosperity of its farm owners that resort may be had to this Court for relief. It is the creation of a public nuisance of simple type for which a State may properly ask an injunction."

sey, 256 U. S., at 313; *New Jersey* v. *New York City*, 283 U. S. 473, 481, 482. In *Missouri* v. *Illinois*, 200 U. S. 496, 520–521, the Court said, "It may be imagined that a nuisance might be created by a State upon a navigable river like the Danube, which would amount to a *casus belli* for a State lower down, unless removed. If such a nuisance were created by a State upon the Mississippi the controversy would be resolved by the more peaceful means of a suit in this court."

It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution. While federal law governs,[9] consideration of state standards may be relevant. Cf. *Connecticut* v. *Massachusetts*, 282 U. S. 660, 670; *Kansas* v. *Colorado*, 185 U. S. 125, 146–147. Thus, a State with high water-quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor. There are no fixed rules that govern; these

[9] "Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain. The more would this seem to be imperative in the present era of growing concern on the part of a State about its ecological conditions and impairments of them. In the outside sources of such impairment, more conflicting disputes, increasing assertions and proliferating contentions would seem to be inevitable. Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights. And the logic and practicality of regarding such claims as being entitled to be asserted within the federal-question jurisdiction of § 1331 (a) would seem to be self-evident." *Texas* v. *Pankey*, 441 F. 2d 236, 241–242.

will be equity suits in which the informed judgment of the chancellor will largely govern.

We deny, without prejudice, the motion for leave to file. While this original suit normally might be the appropriate vehicle for resolving this controversy, we exercise our discretion to remit the parties to an appropriate district court [10] whose powers are adequate to resolve the issues.

So ordered.

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[10] The rule of decision being federal, the "action . . . may be brought only in the judicial district where all defendants reside, or in which the claim arose," 28 U. S. C. § 1391 (b), thereby giving flexibility to the choice of venue. See also 28 U. S. C. § 1407.

Whatever may be a municipality's sovereign immunity in actions for damages, see Van Alstyne, Governmental Tort Liability: A Decade of Change, 1966 U. Ill. L. F. 919, 944–948; Note, 4 Suffolk L. Rev. 832 (1970), actions seeking injunctive relief stand on a different footing. The cases are virtually unanimous in holding that municipalities are subject to injunctions to abate nuisances. See cases collected in 17 E. McQuillin, The Law of Municipal Corporations § 49.51 *et seq.* (3d rev. ed. 1968). See also Wis. Stat. Ann. § 59.96 (6)(b) (1957) as respects the suability of metropolitan sewerage commissions.

While the kind of equitable relief to be accorded lies in the discretion of the chancellor (*Harrisonville* v. *Dickey Clay Mfg. Co.*, 289 U. S. 334), a State that causes a public nuisance is suable in this Court and any of its public entities is suable in a federal district court having jurisdiction:

"[I]t is generally held that a municipality, like a private individual, may be enjoined from maintaining a nuisance. Thus in a proper case a municipal corporation will be restrained by injunction from creating a nuisance on private property, as by the discharge of sewage or poisonous gases thereon, or, in some jurisdictions, by the obstruction of drainage of waters, or by discharging sewage or filth into a stream and polluting the water to the damage of lower riparian owners, or by dumping garbage or refuse, or by other acts. Likewise, a municipality may be enjoined from creating or operating a nuisance, whether the municipality is acting in a governmental or proprietary capacity, impairing property rights. And, if a nuisance is established causing irreparable injury for which there is no adequate remedy at law it may be enjoined irrespective of the resulting damage or injury to the municipality." 17 McQuillin, *supra*, § 49.55.

The pertinent provisions of the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§1251 *et seq.*, are as follows:

SUBCHAPTER I — RESEARCH AND RELATED PROGRAMS

§1251. [101*] Congressional declaration of goals and policy

(a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter —

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

* Section numbers from the Act itself are bracketed alongside section numbers from 33 U.S.C.

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

* * *

§1252. [102] Comprehensive programs for water pollution control

Preparation and development

(a) The Administrator shall, after careful investigation, and in cooperation with other Federal agencies, State water pollution control agencies, interstate agencies, and the municipalities and industries involved, prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters. In the development of such comprehensive programs due regard shall be given to the improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife, recreational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes. For the purpose of this section, the Administrator is authorized to make joint investigations with any such agencies of the condition of any waters in any State or States, and of the discharges of any sewage, industrial wastes, or substance which may adversely affect such waters.

* * *

§1254. [104] Research, investigations, training, and information

Establishment of national programs; cooperation; investigations; water quality surveillance system; reports

(a) The Administrator shall establish national programs for the prevention, reduction, and elimination of pollution. . . .

Research and studies on harmful effects of pollutants; cooperation with Secretary of Health, Education, and Welfare

(c) In carrying out the provisions of subsection (a) of this section the Administrator shall conduct research on, and survey the results of scientific studies on, the harmful effects on the health or welfare of persons caused by pollutants.

* * *

Lake pollution

(h) The Administrator is authorized to enter into contracts with, or make grants to, public or private agencies and organizations and individuals for (A) the purpose of developing and demonstrating new or improved methods for the prevention, removal, reduction, and elimination of pollution in lakes, including the undesirable effects of nutrients and vegetation, and (B) the construction of publicly owned research facilities for such purpose.

* * *

§1255. [105] Grants for research and development

Demonstration projects covering storm waters, advanced waste treatment and water purification methods, and joint treatment systems for municipal and industrial wastes

(a) The Administrator is authorized to conduct in the Environmental Protection Agency, and to make grants to any State, municipality, or intermunicipal or interstate agency for the purpose of assisting in the development of —

(1) any project which will demonstrate a new or improved method of preventing, reducing, and eliminating the discharge into any waters of pollutants from sewers

which carry storm water or both storm water and pollutants; or

(2) any project which will demonstrate advanced waste treatment and water purification methods (including the temporary use of new or improved chemical additives which provide substantial immediate improvement to existing treatment processes), or new or improved methods of joint treatment systems for municipal and industrial wastes;

and to include in such grants such amounts as are necessary for the purpose of reports, plans, and specifications in connection therewith.

* * *

Accelerated and priority development of waste management and waste treatment methods and identification and measurement methods

(d) In carrying out the provisions of this section, the Administrator shall conduct, on a priority basis, an accelerated effort to develop, refine, and achieve practical application of:

(1) waste management methods applicable to point and nonpoint sources of pollutants to eliminate the discharge of pollutants, including, but not limited to, elimination of runoff of pollutants and the effects of pollutants from inplace or accumulated sources;

(2) advanced waste treatment methods applicable to point and nonpoint sources, including inplace or accumulated sources of pollutants, and methods for reclaiming and recycling water and confining pollutants so they will not migrate to cause water or other environmental pollution; and

(3) improved methods and procedures to identify and measure the effects of pollutants on the chemical,

physical, and biological integrity of water, including those pollutants created by new technological developments.

* * *

§1258. [108] Pollution control in Great Lakes

Demonstration projects

(a) The Administrator, in cooperation with other Federal departments, agencies, and instrumentalities is authorized to enter into agreements with any State, political subdivision, interstate agency, or other public agency, or combination thereof, to carry out one or more projects to demonstrate new methods and techniques and to develop preliminary plans for the elimination or control of pollution, within all or any part of the watersheds of the Great Lakes. Such projects shall demonstrate the engineering and economic feasibility and practicality of removal of pollutants and prevention of any polluting matter from entering into the Great Lakes in the future and other reduction and remedial techniques which will contribute substantially to effective and practical methods of pollution prevention, reduction, or elimination.

* * *

SUBCHAPTER II — GRANTS FOR CONSTRUCTION OF TREATMENT WORKS

§1281. [201] Congressional declaration of purpose

(a) It is the purpose of this subchapter to require and to assist the development and implementation of waste treatment management plans and practices which will achieve the goals of this chapter.

(b) Waste treatment management plans and practices shall provide for the application of the best practicable waste treatment technology before any discharge into receiving waters, including reclaiming and recycling of water, and con-

fined disposal of pollutants so they will not migrate to cause water or other environmental pollution and shall provide for consideration of advanced waste treatment techniques.

(c) To the extent practicable, waste treatment management shall be on an areawide basis and provide control or treatment of all point and nonpoint sources of pollution, including in place or accumulated pollution sources.

(d) The Administrator shall encourage waste treatment management which results in the construction of revenue producing facilities providing for —

(1) the recycling of potential sewage pollutants through the production of agriculture, silviculture, or aquaculture products, or any combination thereof;

(2) the confined and contained disposal of pollutants not recycled;

(3) the reclamation of wastewater; and

(4) the ultimate disposal of sludge in a manner that will not result in environmental hazards.

(e) The Administrator shall encourage waste treatment management which results in integrating facilities for sewage treatment and recycling with facilities to treat, dispose of, or utilize other industrial and municipal wastes, including but not limited to solid waste and waste heat and thermal discharges. Such integrated facilities shall be designed and operated to produce revenues in excess of capital and operation and maintenance costs and such revenues shall be used by the designated regional management agency to aid in financing other environmental improvement programs.

(f) The Administrator shall encourage waste treatment management which combines "open space" and recreational considerations with such management.

(g)(1) The Administrator is authorized to make grants to any State, municipality, or intermunicipal or interstate agency for the construction of publicly owned treatment works.

(2) The Administrator shall not make grants from funds authorized for any fiscal year beginning after June 30, 1974, to any State, municipality, or intermunicipal or interstate agency for the erection, building, acquisition, alteration, remodeling, improvement, or extension of treatment works unless the grant applicant has satisfactorily demonstrated to the Administrator that —

(A) alternative waste management techniques have been studied and evaluated and the works proposed for grant assistance will provide for the application of the best practicable waste treatment technology over the life of the works consistent with the purposes of this subchapter; and

(B) as appropriate, the works proposed for grant assistance will take into account and allow to the extent practicable the application of technology at a later date which will provide for the reclaiming or recycling of water or otherwise eliminate the discharge of pollutants.

(3) The Administrator shall not approve any grant after July 1, 1973, for treatment works under this section unless the applicant shows to the satisfaction of the Administrator that each sewer collection system discharging into such treatment works is not subject to excessive infiltration.

* * *

(5) The Administrator shall not make grants from funds authorized for any fiscal year beginning after September 30, 1978, to any State, municipality, or intermunicipal or interstate agency for the erection, building, acquisition, alteration, remodeling, improvement, or extension of treatment works unless the grant applicant has satisfactorily demonstrated to the Administrator that innovative and alternative wastewater treatment processes and techniques which provide for the reclaiming

and reuse of water, otherwise eliminate the discharge of pollutants, and utilize recycling techniques, land treatment, new or improved methods of waste treatment management for municipal and industrial waste (discharged into municipal systems) and the confined disposal of pollutants, so that pollutants will not migrate to cause water or other environmental pollution, have been fully studied and evaluated by the applicant taking into account subsection (d) of this section and taking into account and allowing to the extent practicable the more efficient use of energy and resources.

(6) The Administrator shall not make grants from funds authorized for any fiscal year beginning after September 30, 1978, to any State, municipality, or intermunicipal or interstate agency for the erection, building, acquisition, alteration, remodeling, improvement, or extension of treatment works unless the grant applicant has satisfactorily demonstrated to the Administrator that the applicant has analyzed the potential recreation and open space opportunities in the planning of the proposed treatment works.

* * *

(i) The Administrator shall encourage waste treatment management methods, processes, and techniques which will reduce total energy requirements.

(j) The Administrator is authorized to make a grant for any treatment works utilizing processes and techniques meeting the guidelines promulgated under section 1314(d)(3) of this title, if the Administrator determines it is in the public interest and if in the cost effectiveness study made of the construction grant application for the purpose of evaluating alternative treatment works, the life cycle cost of the treatment works for which the grant is to be made does not exceed the life cycle cost of the most cost effective alternative by more than 15 per centum.

* * *

§1297. [217] Guidelines for cost-effectiveness analysis

Any guidelines for cost-effectiveness analysis published by the Administrator under this subchapter shall provide for the identification and selection of cost effective alternatives to comply with the objective and goals of this chapter and sections 1281(b), 1281(d), 1281(g)(2)(A), and 1311(b)(2)(B) of this title.

§1311. [301] Effluent limitations

Illegality of pollutant discharges except in compliance with law

(a) Except as in compliance with this [Act], section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

Timeable for achievement of objectives

(b) In order to carry out the objective of this chapter there shall be achieved —

* * *

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

* * *

(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 1281(g)(2)(A) of this title;

* * *

§1312. [302] Water quality related effluent limitations

Establishment

(a) Whenever, in the judgment of the Administrator, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b)(2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

Notice; hearing; adjustment of limitation by Administrator

(b)(1) Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing to determine the relationship of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this chapter) and to determine whether or not such effluent limitations can be implemented with available technology or other alternative control strategies.

(2) If a person affected by such limitation demonstrates at such hearing that (whether or not such technology or other

alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter), such limitation shall not become effective and the Administrator shall adjust such limitation as it applies to such person.

* * *

§1314. [304] Information and guidelines

Criteria development and publication

(a)(1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) criteria for water quality accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare including, but not limited to, plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics, and recreation which may be expected from the presence of pollutants in any body of water, including ground water; (B) on the concentration and dispersal of pollutants, or their byproducts, through biological, physical, and chemical processes; and (C) on the effects of pollutants on biological community diversity, productivity, and stability, including information on the factors affecting rates of eutrophication and rates of organic and inorganic sedimentation for varying types of receiving waters.

(2) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) information (A) on the factors necessary to restore and maintain the chemical, physical, and biological integrity of all navigable waters, ground waters, waters of the contiguous zone, and the oceans; (B) on the factors necessary for the protection and propagation of shellfish, fish, and wildlife for classes and

categories of receiving waters and to allow recreational activities in and on the water; and (C) on the measurement and classification of water quality. . . .

* * *

(4) The Administrator shall, within 90 days after December 27, 1977, and from time to time thereafter, publish and revise as appropriate information identifying conventional pollutants, including but not limited to, pollutants classified as biological oxygen demanding, suspended solids, fecal coliform, and pH. The thermal component of any discharge shall not be identified as a conventional pollutant under this paragraph.

(5)(A) The Administrator, to the extent practicable before consideration of any request under section 1311(g) of this title and within six months after December 27, 1977, shall develop and publish information on the factors necessary for the protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and to allow recreational activities in and on the water.

(B) The Administrator, to the extent practicable before consideration of any application under section 1311(h) of this title and within six months after December 27, 1977, shall develop and publish information on the factors necessary for the protection of public water supplies, and the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife, and to allow recreational activities, in and on the water.

* * *

Effluent limitation guidelines

(b) For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, published within one year of October

18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. . . .

* * *

§1317. [307] Toxic and pretreatment effluent standards

Toxic pollutant list; revision; hearing; promulgation of standards; effective date; consultation

(a)(1) On and after December 27, 1977, the list of toxic pollutants or combination of pollutants subject to this chapter shall consist of those toxic pollutants listed in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives, and the Administrator shall publish, not later than the thirtieth day after December 27, 1977, that list. From time to time thereafter, the Administrator may revise such list and the Administrator is authorized to add to or remove from such list any pollutant. The Administrator in publishing any revised list, including the addition or removal of any pollutant from such list, shall take into account toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollutant on such organisms. A determination of the Administrator under this paragraph shall be final except that if, on judicial review, such determination was based on arbitrary and capricious action of the Administrator, the Administrator shall make a redetermination.

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achievable for the applicable category or class of point sources established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title. . . .

* * *

(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

* * *

§1319. [309] Enforcement

State enforcement; compliance orders

(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person —

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

* * *

Civil actions

(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

Criminal penalties

(c)(1) Any person who willfully or negligently violates section 1311, 1312, 1316, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State or in a permit issued under section 1344 of this title by a State, shall be punished by a fine of not less

than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or both.

* * *

Civil penalties

(d) Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

* * *

§1325. [315] National Study Commission

Establishment

(a) There is established a National Study Commission, which shall make a full and complete investigation and study of all of the technological aspects of achieving, and all aspects of the total economic, social, and environmental effects of achieving or not achieving, the effluent limitations and goals set forth for 1983 in section 1311(b)(2) of this title.

* * *

SUBCHAPTER IV — PERMITS AND LICENSES

§1341. [401] Certification

Compliance with applicable requirements; application; procedures; license suspension

(a)(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. . . .

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall

condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

* * *

§1342. [402] National pollutant discharge elimination system

Permits for discharge of pollutants

(a)(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants . . . upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection. . .

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

* * *

State permit programs

(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete

description of the program it proposes to establish and administer under State law or under an interstate compact. . . . The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

* * *

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

* * *

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

* * *

Compliance with permits

(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. . . .

* * *

§1364. [504] Emergencies

Emergency powers

(a) Notwithstanding any other provision of this chapter, the Administrator upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons where such endangerment is to the livelihood of such persons, such as inability to market shellfish, may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other action as may be necessary.

* * *

§1365. [505] Citizen suits

Authorization; jurisdiction

(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf —

(1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

* * *

Statutory or common law rights not restricted

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or

common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

* * *

§1369. [509] Administrative procedure and judicial review

* * *

Review of Administrator's actions

(b)(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title, and (F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

* * *

Supreme Court, U.S.
FILED
OCT 10 1980
MICHAEL RODAK, JR., CLERK

No. 79-408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Petition for Certiorari Filed
September 11, 1979
Certiorari Granted March 17, 1980

JOINT APPENDIX

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18. Defendants' Exhibit 1311 455

The following opinions, decisions, judgments, and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the Supreme Court, dated April 24, 1972 I-1

Opinion of the District Court for the Northern District of Illinois, dated November 16, 1972 ..... H-1

Opinion of the District Court for the Northern District of Illinois, dated November 1, 1973 ..... G-1

Opinion of the District Court for the Northern District of Illinois, dated July 29, 1977 ..... F-1

Stipulation of the Parties, dated November 14, 1977.. E-1

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Opinion of the Court of Appeals for the Seventh Circuit, dated April 26, 1979 ..... A-1

Unpublished Order of the Court of Appeals for the Seventh Circuit accompanying its April 26, 1979 Opinion, dated April 26, 1979 ..... B-1

Order of the Court of Appeals for the Seventh Circuit denying rehearing, dated June 14, 1977 ..... C-1

RELEVANT DOCKET ENTRIES

5-19-72—Complaint and six copies with exhibits.

6-29-72—Motion of The State of Michigan for leave to intervene as Party Plaintiff, Proposed Complaint and Notice of Hearing.

6-30-72—Motion defendant, Metropolitan Sewerage Commission of The County of Milwaukee to dismiss summons pursuant to Rule 12(b) FRCP.

7-14-72—Interrogatories of defendants, City of Milwaukee & Sewage Commission of City of Milwaukee to be answered by Plaintiff.

7-27-72—Objections to motion for intervention (FRCP-Rule 24) On behalf of Defendants, City of Milwaukee and Sewage Commission of City of Milwaukee.

8-9-72—Plaintiff's Notice of Motion; Motion.

8-23-72—Order: Motion for leave to Intervene as Party Plaintiff by the State of Michigan—taken under Rule 13, Briefs: 20-10 & 5 BAUER, J.

8-23-72—Order: Motion to Waive Local Rule 7 A by the State of Michigan granted. BAUER, J.

8-31-72—Notice of motions, motions of defendants City of Milwaukee, and Sewage Comm. of the City of Milwaukee, to quash the summons and Memorandum in support of defendants City of Milwaukee and Sewage Comm. to quash the summons and to dismiss.

9-28-72—Motion of defendants, Metropolitan Sewerage Comm. of County of Milwaukee.

9-28-72—Motion of defendant Metropolitan Sewerage Commission to dismiss taken under advisement. Briefs instanter, 15 and 10. Ruling set for November 6, 1972—Bauer, J.

9-29-72—Plaintiff's request for production of documents.

10-10-72—Argument—Motion of City of Milwaukee and Sewage Commission of City of Milwaukee to quash summons and to dismiss—Argument—heard and concluded—Cause taken under advisement.—Bauer, J.

10-30-72—Objections of City of Milwaukee and Sewage Commission of Milwaukee to request of plaintiff for production of documents.

11-6-72—Objections of The Metropolitan Sewerage Commission of the County of Milwaukee to the request of the Plaintiff for the production of documents.

11-16-72—Order: Defendant Metro Sewerage Commission's motion to dismiss denied. (Draft) Bauer, J.

11-21-72—Order: Leave to State of Michigan to intervene and to file complaint immediately etc. Each of the parties have 20 days from this date in which to serve an answer or otherwise plead with respect to the complaint of the State of Michigan—Draft—Bauer, J.

12-11-72—Answer of defendants City of Milwaukee and Sewerage Commission of the City of Milwaukee to Complaint of the State of Illinois.

12-11-72—Answer of defendants City of Milwaukee and Sewerage Commission of the City of Milwaukee to complaint of the State of Michigan.

12-11-72—Answer of the Defendant, Metropolitan Sewerage Commission of the County of Milwaukee, to the State of Illinois.

12-11-72—Answer of Metropolitan Sewerage Commission of the County of Milwaukee defendant herein, to the Complaint of the intervening Plaintiff, People of the State of Michigan.

1-24-73—People of the State of Michigan's Notice and copy.

1-24-73—Enter order stipulation and order for leave to Intervene as party plaintiff by the State of Michigan, granted. (DRAFT) BAUER, J.

5-30-73—Plaintiff's Notice of Answers to Interrogatories.

5-30-73—Plaintiff's Supplemental Answers to the Interrogatories of the City of Milwaukee and the Sewage Commission of the City of Milwaukee.

6-14-73—Defendants' Interrogatories.

6-25-73—Defendants' Request for Production of Documents.

6-27-73—Defendants' Request for Production of Documents.

7-17-73—Answer of Intervening Plaintiff, the People of the State of Michigan, to Interrogatories of City of Milwaukee and Sewage Commission of the City of Milwaukee.

7-30-73—Defendants Milwaukee and Sewage Commission's Notice of Motion; Motion and Memorandum in Support of Motion, and copy.

8-1-73—Defendant Metropolitan Sewerage Commission's First Set of Interrogatories to Plaintiff.

7-30-73—Notice of Motion, Motion and Memorandum in Support of Motion by City of Milwaukee.

8-6-73—Defendant Metropolitan Sewage's First Set of Interrogatories to Plaintiff, State of Michigan.

8-17-73—Reply to Request for Production of Documents.

8-21-73—Notice of Motion and Motion of Metropolitan Sewerage Commission to dismiss.

8-21-73—Order: Motion to dismiss for lack of jurisdiction of subject matter taken under advisement. Plaintiff given 10 days to respond. Ruling set for November 1, 1973—Bauer, J.

9-26-73—Intervening plaintiff's notice of answer to interrogatories.

9-26-73—Answers of intervening plaintiff, The People of the State of Michigan, to interrogatories of the Metropolitan Sewerage Commission of the County of Milwaukee.

10-17-73—Order: Plaintiff's motion to file design commitment agreement for the city of Racine and the city of Kenosha and to dismiss these defendants granted and said motion continued to October 31, 1973 for response of opposing parties.—Bauer, J.

11-1-73—City of Kenosha design commitment agreement.

11-1-73—City of Racine design commitment agreement.

11-1-73—Objection of City of Milwaukee, Sewerage Commission of City of Milwaukee, and Metropolitan Sewerage Commission of Milwaukee County to the present pending motion of plaintiffs and contents of the proposed order submitted to the Court, overruled and plaintiff given leave to file design commitment agreement and to dismiss defendants City of Kenosha and City of Racine. (DRAFT) Order: Plaintiffs action against defendants Racine and Kenosha, Wisconsin dismissed etc., (DRAFT) Order: Motion of defendants City of Milwaukee, the Sewerage Commission of the County of Milwaukee and the City of South Milwaukee to dismiss the complaint denied. (DRAFT)—Bauer, J.

2-28-75—Order dated February 24, 1975: Whereas Judge Flaum was in the service of the State's Attorney's Office for Cook County at the commencement of this cause, and whereas this cause was originally assigned to the calendar of Judge Bauer who has been elevated to the Court of Appeals, it is hereby ordered that this cause is reassigned to the calendar of an individual judge of this court in accordance with the rules.—Robson, C.J. FOR THE EXECUTIVE COMITTEE. (JUDGE LYNCH)

12-19-75—Answer of plaintiffs to interrogatories propounded by the Metropolitan Sewage Commission of the County of Milwaukee. bb

12/29/75—Plaintiffs first set of interrogatories directed to defendant, The Sewerage Commission of the City of Milwaukee.

12/29/75—Plaintiffs request for production of documents directed to defendant City of Milwaukee, Wisconsin.

12/29/75—Plaintiffs request for production of documents directed to the defendant The Sewerage Commission of the City of Milwaukee.

12/29/75—Plaintiffs first set of interrogatories directed to defendant the Metropolitan Sewerage Commission of the County of Milwaukee.

12/29/75—Plaintiffs Request for production of documents directed to the defendant the Metropolitan Sewerage Commission of the County of Milwaukee.

12/29/75—Plaintiffs first set of interrogatories to defendant City of Milwaukee Wisconsin.

4/30/76—Defendant, Sewerage Commission of the City of Milwaukee's Answer to Plaintiff's First Set of Interrogatories Directed to Defendant, The Sewerage Commission of the City of Milwaukee.

4/30/76—Answer to Plaintiff's First Set of Interrogatories Directed to the Defendant, Metropolitan Sewerage Commission of the City of Milwaukee.

4/30/76—Response to Request for Production of Documents Directed to Defendant, Metropolitan Sewerage Commission of the County of Milwaukee.

4/30/76—Response to Request for Production of Documents Directed to Defendant City of Milwaukee, Wisconsin.

4/30/76—Answers to Plaintiff's First Set of Interrogatories Directed to Defendant, City of Milwaukee, Wisconsin.

4/30/76—Response to Request for Production of Documents Directed to defendant Sewerage Commission of the City of Milwaukee.

5/18/76—Defendant The Sewerage Commission of the City of Milwaukee's Request for Production of Documents Directed to Plaintiff, People of the State of Illinois ex rel William J. Scott, Set II.

5/18/76—Defendant the Sewerage Commission of the City of Milwaukee's Request for Production of Documents Directed to Intervening Plaintiff People of the State of Michigan, Set II.

5/18/76—Defendant's Second Set of Interrogatories Directed to Plaintiff, People of the State of Illinois, etc.

5/18/76—Second Set of Interrogatories Directed to Intervening Plaintiff People of the State of Michigan.

5/26/76—Defendant's Notice of Motions, Motions to Dismiss and Memorandum Brief of Defendants, City of Milwaukee, Sewerage Commission of the City of Milwaukee and The Metropolitan Sewerage Commission of the County of Milwaukee in Support of Motions to Dismiss.

5/26/76—Defendant, City of Milwaukee's Motion and Brief on Motions Presented.

7-19-76—Plaintiff's state of Illinois' answers to defendants' second set of interrogatories.

7-26-76—Intervening Plaintiff State of Michigan's Answers to defendants' second set of interrogatories.

9/9/76—Filed Response of the State of Illinois to the Motion of the Sewerage Commission of the City of Mil-

waukee for an Order Compelling Further Answers to Interrogatories by the Plaintiff State of Illinois and Compelling Production of Documents.

9/9/76—Filed Notice of Motion and Motion for Orders Compelling Answer to Interrogatories to Party and Compelling Response to Demand for Production of Documents.

9/22/76—Order dated September 9, 1976: Enter order resetting the trial from October 5, 1976 to January 3, 1977. Defendants have 10 days to respond to plaintiffs' brief in opposition to the motion to compel and plaintiff 5 days to reply (Draft).—Grady, J.

9/27/76—Order dated September 22, 1976: Defendant's motion to dismiss, motion for class action status, motion for joinder and motion for complex litigation status are all denied (draft).—Grady, J.

10/21/76—Order dated October 20, 1976: Plaintiffs are ordered to furnish supplemental answers to defendants' interrogatories and to produce all relevant documents by November 20, 1976. Defendants are ordered to furnish supplemental answers to plaintiffs' interrogatories by November 20, 1975. Attorneys fees will be assessed against any party found to be in violation of this order or to have unreasonably withheld relevant discovery.—Grady, J.

10/27/76—Defendant, City of Milwaukee, the Sewerage Commission of the City of Milwaukee and Metropolitan Sewerage Commission of the County of Milwaukee's Notice of Appeal from the order entered September 27, 1976 in favor of plaintiffs. msn

10/27/53—Defendants' Motion to Delay the January 3, 1977 trial date in light of this court's order dated October 20, 1976. msn

10/29/76—Order dated October 28, 1976: Pursuant to the court's Memorandum Opinion dated September 22, 1976, defendants' motion to dismiss, motion for joinder, motion for class action status and motion for complex litigation status are all denied. Defendants' motion to postpone the trial date until completion of the study of the Environmental Protection Agency is also denied. Defendants' motion for certification of these questions under 28 USC § 1292(b) is also denied.—Grady, J.

11/2/76—Defendants' Notice of Motion and Motion to Limit Discovery. msn

11/3/76—Order dated November 3, 1976: Defendant's motion to delay the January 3, 1977 trial date in light of this court's order dated October 20, 1976 is denied.—Grady, J.

11/8/76—Plaintiff's Memorandum of Law in Support of Motion to Strike.

11/8/76—Defendants' Memorandum in Support of Motion to Limit Discovery and Affidavit of Mailing.

11/9/76—Defendants' Notice of Appeal from the order entered on the 28th day of October.

11/19/76—Order dated November 17, 1976: Certain documents shall be produced for inspection and copying no later than December 11, 1976; both sides to make all witnesses available for deposition no later than December 20, 1976; all parties shall have indicated any objections to the authenticity of documents by December 22, 1976. Cause is continued for status report to December 29, 1976 at 2 p.m.—Grady, J.

11/22/76—Defendant, The Sewerage Commission of the City of Milwaukee's Supplemental Answer to Interrogatories of Plaintiff, State of Illinois.

11/22/76—Supplemental Answers to First Set of Interrogatories of Plaintiff, State of Illinois.

11/22/76—Supplemental Answers to Plaintiff's First Set of Interrogatories Directed to Defendant City of Milwaukee, Wisconsin.

12/8/76—Filed Motion to Compel Further Production of Documents.

12/10/76—Order dated December 8, 1976: Motion of plaintiff to compel further production of documents is granted. Counsel for plaintiff to prepare and submit a draft order.—Grady, J.

12/27/76—Certified copy of order from USCA denying the petition for writ of mandamus.

12/30/76—Order dated December 29, 1976: By Friday, December 31, 1976, each side is to submit to the other side the names and addresses of all witnesses they intend to have testify in their respective cases in chief. This cause is set down for trial on Monday, January 10, 1977 at 10 a.m.—Grady, J.

1/3/77—Filed defendants' Metropolitan Sewerage Commission of the County of Milwaukee and the Sewerage Commission of the City of Milwaukees' Witness List.

1/4/77—Certified copy of USCA order: It is further ordered that this appeal be dismissed by stipulation with each party to bear its own costs.

1/4/77—Received record, USCA, consisting of three volumes of pleadings.

1/5/77—Defendants' Exhibits (list of documents).

1/12/77—Order dated January 11, 1977: Cause is called for trial by the Court. Motion is submitted by defendants. Item 1 of defendant's motion granted; item 2 granted, items 3 and 4 denied, as to items 5 and 6, the Court reserves its ruling; item 7 denied; item 8 is granted. Motion by plaintiff to dismiss defendant City of South Milwaukee, Wisconsin granted. Opening

statements heard and concluded. Evidence presented for plaintiffs in part. Trial is adjourned to January 13, 1977 at 10 a.m.—Grady, J.

1/14/77—Order dated January 13, 1977: Trial is resumed. Over objections the Court grants the motion of plaintiff to dismiss the defendant City of Milwaukee as a defendant in this action, with prejudice. Further evidence presented for the plaintiff in part. Trial is adjourned to Friday, January 14, 1977 at 10 a.m.—Grady, J.

1/19/77—Order dated January 17, 1977: Trial is resumed. Further evidence for the plaintiff in part, and the trial is adjourned to January 18, 1977 at 10 a.m.—Grady, J.

1/19/77—Order dated January 18, 1977: Trial is resumed. Further evidence for the plaintiff in part. Trial is adjourned to January 18, 1977 at 10 a.m.—Grady, J.

1/21/77—Order dated January 20, 1977: Trial is resumed. Further evidence for the plaintiff in part. Trial is adjourned until Friday, January 21, 1977 at 10 a.m.

1/24/77—Order dated January 21, 1977: Trial resumed. Further evidence for the Plaintiff in part. Trial is adjourned to January 24, 1977 at 10 a.m.—Grady, J.

1/26/77—Order dated January 24, 1977: Trial is resumed. Further evidence for the plaintiff, in part. Trial is adjourned until January 25, 1977 at 10 a.m.—Grady, J.

1/26/77—Order dated January 25, 1977: Trial is resumed. Further evidence for the plaintiff, in part. Trial is adjourned to Thursday, January 27, 1977 at 10 a.m.—Grady, J.

1/31/77—Order dated January 27, 1977: Trial resumed. Further evidence for the plaintiff in part. Trial is adjourned until January 28, 1977 at 10 a.m.—Grady, J.

1/31/77—Order dated January 28, 1977: Trial resumed. Further evidence for the plaintiff in part. Trial is ad-

journed until Tuesday, February 1, 1977 at 10 a.m.—Grady, J.

2/7/77—Order dated February 1, 1977: Trial is resumed. Further evidence for the plaintiff in part. Trial is adjourned with Thursday, February 3, 1977 at 9:30 a.m. —Leighton, J.

2/7/77—Order dated February 3, 1977: Trial is resumed. Further evidence for the plaintiff in part. Trial is adjourned to Friday, February 4, 1977 at 9:30 a.m.—Leighton, J.

2/7/77—Order dater February 4, 1977: Trial is resumed. Further evidence for the plaintiff in part. Trial is adjourned untl Monday, February 7, 1977 at 9:30 a.m. —Leighton, J.

2/14/77—Order dated February 7, 1977: Trial is resumed. Further evidence for plaintiff in part. Trial adjourned to February 8, 1977 at 10 a.m.—Grady, J.

2/14/77—Order dated February 10, 1977: Trial is resumed. Further Evidence for the plaintiff in part. Trial is adjourned until Friday, February 11, 1977 at 10:30 a.m. —Grady, J.

2/16/77—Order dated February 11, 1977: Trial is resumed. Further evidence for the plaintiff in part. Trial is adjourned until Monday, February 14, 1977 at 9:30—Grady, J.

2/16/77—Order dated February 14, 1977: Because of illness of one of the plaintiff's attorneys, trial is continued until Tuesday, February 15, 1977 at 10 a.m.—Grady, J.

2/16/77—Order dated February 15, 1977: Trial is resumed. Further evidence for the plaintiff in part. The trial is adjourned until February 16, 1977 at 9:30 a.m.—Grady, J.

2/17/77—Order dated February 16, 1977: Trial is resumed. Further evidence for the plaintiff in part. Trial is adjourned until February 17, 1977 at 10 a.m.—Grady, J.

2/22/77—Order dated February 17, 1977: Trial is resumed. Further evidence presented for the plaintiff and the plaintiff rests. Evidence presented for the defendants in part. The trial is adjourned until February 23, 1977 at 10 a.m.—Grady, J.

2/28/77—Order dated February 24, 1977: Trial is resumed. Further evidence for the defendants in part. Trial adjourned to Friday, February 25, 1977 at 9:30 a.m. —Grady, J.

2/28/77—Order dated February 23, 1977: Trial is resumed. Further evidence for the defendant in part. Trial is adjourned to Thursday, February 24, 1977 at 9:30 a.m. Grady, J.

2/28/77—Order dated February 25, 1977: Trial is resumed. Further evidence for the defendant in part. Trial is hereby adjourned until March 7, 1977 at 10 a.m.— Grady, J.

3/9/77—Order dated March 7, 1977: Trial is resumed. Further evidence for the defendants in part. Trial is adjourned until Tuesday, March 8, 1977 at 10 a.m.— Grady, J.

3/9/77—Order dated March 8, 1977: Trial is resumed. Further evidence presented for the defendants in part. Trial is adjourned until Wednesday, March 9, 1977 at 10 a.m.—Grady, J.

3/9/77—Metropolitan Milwaukee Association of Commerce's Motion to Suspend Rule 7 of the Rules of the Court.

3/10/77—Order dated March 9, 1977: Leave is granted Metropolitan Milwaukee Assoc. of Commerce to file a

brief as Amicus Curiae on March 30, 1977. Motion for Amicus Curiae to suspend Rule 7 of the Rules of this court, granted.—Grady, J.

3/9/77—Order dated March 9, 1977: Trial is resumed. Further evidence for the defendants in part and trial is adjourned until Thursday March 10, 1977 at 9:30 a.m.—Grady, J.

3/14/77—Order dated March 10, 1977: Trial is resumed. Further evidence for the defendants in part and trial is adjourned to Friday March 11, 1977 at 10 a.m.—Grady, J.

3/14/77—Order dated March 11, 1977: Trial is resumed. Further evidence for the defendants in part and trial is adjourned to Monday March 14, 1977 at 10 a.m.—Grady, J.

3/16/77—Order dated March 14, 1977: Trial is resumed. Further evidence presented for the defendants in part. Trial is adjourned until Tuesday, March 15, 1977 at 10 a.m.—Grady, J.

3/16/77—Order dated March 15, 1977: Trial is resumed. Further evidence for the defendants in part. Trial is adjourned until Wednesday, March 16, 1977 at 9:30 a.m.—Grady, J.

3/18/77—Order dated March 17, 1977: Trial is resumed. Further evidence for the defendants in part: Trial is adjourned to Friday, March 18, 1977 at 9 a.m.—Grady, J.

3/18/77—Order dated March 16, 1977: Trial resumed. Further evidence presented for the defendants in part and the trial is adjourned until Thursday, March 17, 1977 at 10 a.m.—Grady, J.

3/22/77—Order dated March 18, 1977: Trial is resumed. Further evidence for the defendants in part: Trial is

adjourned to Monday, March 21, 1977 at 10 a.m.—Grady, J.

3/21/77—Order dated March 21, 1977: Trial is resumed. Further evidence for the defendants in part. Trial is adjourned until Tuesday, March 22, 1977 at 10 a.m.—Grady, J.

3/22/77—Order dated March 22, 1977: Trial is resumed. Further evidence presented for the defendants in part and the trial is adjourned until March 23, 1977 at 9:30 a.m.—Grady, J.

3/22/77—Motion to Quash Portion of Subpoena Served on Dr. Robert Agnew.

3/22/77—Order dated March 22, 1977: Motion of the government to quash portion of subpoena served on Dr. Robert Agnew is entered and continued generally.—Grady, J.

3/24/77—Order dated March 23, 1977: Leave granted to Citizens for a Better Environment and the Milwaukee River Restoration Council to file a short brief as amicus curiae. Motion to suspend Rule 7 of the rules of this court, granted.—Grady, J.

3/24/77—Order dated March 23, 1977: Trial is resumed. Further evidence for the defendants in part and the trial is adjourned to Thursday, March 24, 1977 at 10 a.m.—Grady, J.

3/28/77—Order dated March 24, 1977: Trial is resumed. Further evidence for the defendants in part and the trial is adjourned until Friday, March 25, 1977 at 10 a.m.—Grady, J.

3/28/77—Order dated March 25, 1977: Motion of the Federal Highway Administration, Dept of Transportation to quash a portion of a subpoena served on Dr. Robert Agnew, denied.—Grady, J.

3/31/77—Order dated March 25, 1977: Trial resumed, further evidence for the defendants in part. Trial is adjourned until Monday, March 28, 1977 at 9:30 a.m.—Grady, J.

3/31/77—Order dated March 28, 1977: Trial is resumed. Further evidence for the defendants in part. Trial is adjourned until March 29, 1977 at 10 a.m.—Grady, J.

3/31/77—Order dated March 29, 1977: Trial is resumed. Further evidence presented for the defendants in part. Trial is adjourned until Thursday, March 31, 1977 at 9:30 a.m.—Grady, J.

4/4/77—Order dated March 31, 1977: Trial resumed, further evidence for the defendants in part. Trial is adjourned until Friday, April 1, 1977 at 9:30 a.m.—Grady, J.

4/4/77—Order dated April 1, 1977: Trial is resumed. Further evidence presented by the defendants in part. Trial is hereby adjourned until May 23, 1977 at 10 a.m.—Grady, J.

5/25/77—Order dated May 23, 1977: Trial resumed. Further evidence for the defendants in part. Trial is adjourned until May 24, 1977 at 10 a.m.—Grady, J.

5/25/77—Order dated May 24, 1977: Trial resumed. Further evidence for the defendants in part. Trial is adjourned until May 26, 1977 at 9:30 a.m.—Grady, J.

5/27/77—Order dated May 26, 1977: Trial is resumed. Further evidence is presented by the defendants in part. Trial is adjourned until Friday, May 27, 1977 at 9:30 a.m.—Grady, J.

6/1/77—Order dated 5/27/77: Trial resumed. Further evidence for the defendants in part. Trial is adjourned until Tuesday, May 31, 1977 at 10:00 am. Grady, J.

5/31/77—Defendant's, Sewerage Commission of the City of Milwaukee and Metropolitan Sewerage Commission of the County of Milwaukee, Motion to dismiss; Affidavit of Ewald L. Moerke, Jr. with attachments.

6/2/77—Order dated 5/31/77: Trial is resumed. Motion of Sewerage Commission, Metropolitan Sewerage Commission and the City of Milwaukee, to dismiss the above-captioned action now on trial is denied. Further evidence presented for the defendants in part. Trial is adjourned until Wednesday, June 1, 1977 at 9:30 am. Grady, J.

6/3/77—Order dated 6/1/77: Trial is resumed. Further evidence is presented by the defendants in part. Trial is adjourned until June 2, 1977 at 9:30 am. Grady, J.

6/3/77—Order dated 6/2/77: Trial resumed. Further evidence is presented for the defendants in part. Trial is adjourned until Monday, June 27, 1977 at 10:00 am. Grady, J.

6/22/77—Plaintiff's motion to compel attendance of witnesses at deposition.

6/23/77—Order dated 6/22/77: The Court orders certain depositions to be taken. Cause taken off the trial call on Monday, June 27, 1977. Grady, J.

6/24/77—Order dated 6/23/77: Ordered that the trial in this cause is set to resume on Tuesday, June 28, 1977 at 9:30 am. Grady, J.

6/29/77—Order dated 6/28/77: Trial resumed. Further evidence presented for the defendants in part. Trial is adjourned until Wednesday 29, 1977 at 10:00 am. Grady, J.

6/30/77—Order dated 6/29/77: Trial resumed, Further evidence for defendants in part. Trial adjourned until Thursday, June 30, 1977 at 10:30 am. Grady, J.

7/5/77—Order dated 6/30/77: Trial resumed, further evidence for the defendants in part. Trial is adjourned until Friday, July 1, 1977 at 1:30 am. Grady, J.

7/6/77—Order dated 7/1/77: Trial resumed, further evidence for defendants and the trial is adjourned until July 5, 1977 at 10:00 am. Grady, J.

7/6/77—Order dated 7/5/77: Trial resumed further evidence for the defendants in part. Trial adjourned to Wednesday, July 6, 1977 at 9:30 am. Grady, J.

7/7/77—Order dated 7/6/77: Trial is resumed further evidence for the defendants in part. Trial is adjourned to Thursday, July 7, 1977 at 9:30 am. Grady, J.

7/8/77—Order dated 7/7/77: Trial resumed, further evidence for the defendants, in part. Trial adjourned until Friday, July 3, 1977 at 9:30 am. Grady, J.

7/11/77—Order dated 7/8/77: Trial resumed, further evidence for the defendant. Trial adjourned until Monday, July 11, 1977 at 9:30 am. Grady, J.

7/12/77—Order dated 7/11/77: Trial resumed. Further evidence for the defendants and the defendants rest. Rebuttal evidence for the Plaintiff in part. Trial adjourned until Tuesday, July 12, 1977 at 10:00 am. Grady, J.

7/14/77—Order dated 7/12/77: Trial resumed. Further rebuttal evidence. Trial adjourned until Thursday, July 14, 1977 at 9:30 am. Grady, J.

7/18/77—Order dated 7/14/77: Trial held. Further rebuttal evidence presented. Trial adjourned until Friday, July 15, 1977 at 9:30 am. Grady, J.

7/19/77—Order dated 7/15/77: Trial held. Further rebuttal evidence presented. Trial is adjourned to Monday, July 18, 1977 at 9:30 am. Grady, J.

7/20/77—Order dated 7/18/77: Trial held. Further rebuttal evidence presented. Trial is adjourned to July 19, 1977 at 10:00 am. Grady, J.

7/20/77—Order dated 7/19/77: Trial is not held. Trial continued to Wednesday, July 20, 1977 at 10:00 am. Grady, J.

7/22/77—Order dated 7/20/77: Trial held. Rebuttal evidence concluded. Trial conference re evidence set on July 21, 1977 at 3:00 pm. Grady, J.

7/22/77—Order dated 7/21/77: Trial conference re evidence held. Cause is continued for final arguments to Monday, July 25, 1977 at 9:30 am. Grady, J.

7-27-77—Order dated July 25, 1977: Trial held. Final arguments in part. Trial adjourned until July 26, 1977 at 9:30 am. Grady, J.

7-27-77—Order dated July 26, 1977: Trial held. Final arguments concluded. Cause taken under advisement for decision on Friday, July 29, 1977 at 10:00 am. Grady, J.

8/2/77—Order dated 7/29/77: Trial concluded. The Court finds in favor of the plaintiffs and against the defendants on the issue of liability as to the three (3) counts of the complaint. Counsel for the plaintiffs to prepare and to submit by September 9, 1977 a judgment order for entry. Grady, J.

8/30/77—Order dated 8/29/77: Enter findings of fact and conclusions of Law (Draft) Grady, J.

9/12/77—Order dated 9/9/77: Motion by defendants amending the findings of fact and conclusions of law etc. denied. Depositions to commence the week of October 10, 1977 and are to end the week of November 1, 1977. Evidentiary hearing set on November 14, 1977 at 10:00 am. Grady, J.

9/9/77—Defendant's, City of Milwaukee, Notice of motion and motion to amend;

9/9/77—Defendant's, City of Milwaukee, compliance schedule

9/9/77—Defendant's, Sewerage Commission City of Milwaukee, schedule of compliance with attachments

9/21/77—Plaintiff's request for production of documents

9/21/77—Plaintiff's motion to advance the date for defendants' response to plaintiff's request for production of documents

9/22/77—Order dated 9/21/77: The time for compliance with plaintiff's request for production of documents will be shortened to October 3, 1977 and the plaintiff shall have until October 3, 1977 to furnish documents requested by defendant. Grady, J.

10/3/77—Defendants, D5&6, partial response to Plaintiff's document production request

10/3/77—Defendants' D5&6, Defendant Sewerage Commissions' request for production of documents

10-3-77—Plaintiff's response to defendant Sewerage Commissions' request for production of documents.

10-3-77—Defendants Sewerage Commission of the City of Milwaukee and Metropolitan Sewerage Commission's second partial response to plaintiff's documents production request.

10-3-77—Defendants Sewerage Commission of the City of Milwaukee and Metropolitan Sewerage Commission's third partial response to plaintiff's documents production request.

11/16/77—Order dated 11/14/77: Evidentiary hearing not held. Hearing held on the proposed judgment order. Draft judgment order to be submitted for entry. Grady, J.

11/16/77—Order dated 11/15/77: Enter judgment order (See Draft) Grady, J.

11/16/77—Rule 58 judgment dated 11/15/77

1/13/78—Defendants' Sewerage and Metropolitan, letter dated 1/12/78 re additional exhibits

7-5-79—Opinion No. 77-2246 of USCA dated 6-29-79.

7-5-79—Certified copy of Judgment order from the U.S. C.A., 7th Cir. dated April 26, 1979/ . . . It is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED in part, REVERSED and Remanded in part, in accordance with the order of this court entered, and the opinion of this court filed this date.

11-16-79—Order dated November 15, 1979; Plaintiff has not commented in writing on the proposed modified judgment order submitted by defendant. Plaintiff may do so by November 28, 1979, suggesting alternate language for any provision with which it disagrees. Defendant may reply by December 7, 1979 (draft)—GRADY, J.

11-30-79—Plaintiff State of Illinois' 11-28-79 response to court order of November 15, 1979.

12-6-79—Defendants The Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee and City of Milwaukees' 11-28-79 notice of filing; motion for modification of judgment order; affidavit in support of motion for modification of judgment order; affidavit in support of motion for modification of judgment order.

12-6-79—Order dated December 5, 1979; Modified judgment order to be entered at a later date. Hearing set for Thursday, January 31, 1980 at 10 a.m.

12-11-79—Defendants' 12-10-79 reply to "Illinois" response to court order of November 15, 1979.

12-11-79—Intervening plaintiff State of Michigan's 12-10-79 response to court order of November 15, 1979; attachments.

1-8-80—Order dated 1-3-80: Plaintiff may submit its version of the amended judgment order, the order is to be submitted no later than January 14, 1980. (DRAFT).

2-1-80—Order dated January 31, 1980: Hearing held on Amended Judgment order and on Supplement # 1 to the Judgment order. (DRAFT) Enter Amended Judgment Order (DRAFT) Enter Supplement # 1 to the Judgment order. (DRAFT) (2 DRAFTS)—GRADY, J.

2-28-80—Notice of appeal by defendants City of Milwaukee, the Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee.

3/13/80—Notice of Cross-Appeal by Plaintiff from the Amended Judgment Order entered 1/31/80.

10-11-79—Order dated 10-10-79: Enter Motion by certain defendants to modify judgment order. Defendants Memorandum to be filed on October 22, 1979. Plaintiffs response to be filed on November 1st, 1979; reply to response due to be filed on November 8, 1979. The Motion will then be taken under advisement. GRADY, J.

3-27-80—Certified and transmitted record on appeal in one volume consisting of documents filed on 7-5-79 through and including 3-27-80.

1-31-80—Amended Judgment Order.

2-27-80—Defendants' Notice of Appeal to USCA from Amended Judgment Order.

3-12-80—Plaintiff's Notice of Cross-Appeal to USCA from Amended Judgment Order.

4-3-80—Defendants' Application to USCA for Stay Pending Certiorari.

4-8-80—Order: USCA stays defendants' appeal and plaintiff's cross-appeal pending certiorari.

4-16-80—Order: USCA determines it lacks jurisdiction to stay effect of judgments, decrees and orders of it and USDC pending certiorari.

4-24-80—Defendants' Application to U.S. Supreme Court for Stay Pending Certiorari.

5-8-80—Order: Stay Pending Certiorari granted. Stevens, J.

Complaint of State of Illinois

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 72C-1253

PEOPLE OF THE STATE OF ILLINOIS ex rel. WILLIAM J. SCOTT, Attorney General of the State of Illinois, *Plaintiff*,

v.

CITY OF MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF KENOSHA, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF RACINE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF SOUTH MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, a municipality existing under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, *Defendants*.

COMPLAINT

NOW COMES plaintiff, THE PEOPLE OF THE STATE OF ILLINOIS ex rel. WILLIAM J. SCOTT, Attorney General of the

State of Illinois, and complaining of defendants, CITY OF MILWAUKEE, WISCONSIN, CITY OF KENOSHA, WISCONSIN, CITY OF RACINE, WISCONSIN, CITY OF SOUTH MILWAUKEE, WISCONSIN, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, alleges as follows:

Count I

1. This Count arises under the Constitution and laws of the United States. The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs. This Court has jurisdicton of the count by virtue of 28 U.S.C. § 1331, as is set out more fully in the opinion of the United States Supreme Court in *Illinois* v. *City of Milwaukee, Wisconsin,* No. 49 Original, April 24, 1972, a copy of which opinion is attached hereto as Exhibit A [omitted], and is made a part hereof.

2. Plaintiff, PEOPLE OF THE STATE OF ILLINOIS ex rel. WILLIAM J. SCOTT, Attorney General of the State of Illinois, is a sovereign State of these United States, comprised of more than 11 million residents as of the 1970 United States census. Plaintiff is vitally concerned with matters of environmental quality affecting its air, land, and water, and in this regard has enacted comprehensive environmental legislation (Illinois Environmental Protection Act of 1970, Ill. Rev. Stat. 1971, Ch. 111-1/2, § 1001 et seq.), which legislation includes concern over pollution of the waters of the State of Illinois whether such pollution occurs as a result of discharges within or without Illinois and prohibits such discharges. The relator, WILLIAM J. SCOTT, Attorney General of the State of Illinois, is the duly elected, qualified and acting Attorney General of the State of Illinois, and is the chief legal officer for the plaintiff and in that capacity is empowered to bring, and does bring, this suit on behalf of plaintiff.

3. The defendants, CITY OF MILWAUKEE, WISCONSIN, CITY OF KENOSHA, WISCONSIN, CITY OF RACINE, WISCONSIN, CITY OF SOUTH MILWAUKEE, WISCONSIN, SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, are municipalities, incorporated under the laws of the State of Wisconsin, political subdivisions thereof and hence citizens of that State. The defendant Sewerage Commission of the City of Milwaukee is charged by it with the duty of collecting, transmitting, and disposing of the City's sewage, while the defendant Metropolitan Sewerage Commission of the County of Milwaukee has the responsibility for the transmission, treatment, and disposal of sewage from territory located within its drainage area.

4. At all times pertinent to this complaint, the State of Illinois has been and now is the owner in trust, for the benefit of its citizens, of the waters of Lake Michigan within the State's territorial boundaries, and the protector and guardian of these waters for the use, needs, and enjoyment of its citizens and inhabitants, along the Illinois shore from the Wisconsin-Illinois boundary to the Indiana-Illinois boundary.

5. From ancient geological periods, Lake Michigan has been and now is a natural body of fresh water. It is bordered by the States of Illinois, Wisconsin, Michigan, and Indiana. Frequently, natural currents and atmospheric conditions cause the waters of Lake Michigan to flow north to south along the shoreline of Lake Michigan from a point north of the City of Milwaukee, past the cities of Milwaukee, South Milwaukee, Racine, and Kenosha, Wisconsin, past the Wisconsin-Illinois boundary and along the Illinois shore, and thence southerly and easterly past the Indiana-Illinois boundary and along the Indiana shore. Lake Michigan has been and is now a vital source of public water supply for many municipalities, citizens, and inhabitants of the State of Illinois, and has been and is now used as a

place of recreation, relaxation, and enjoyment by numerous citizens and inhabitants of the State of Illinois.

6. The defendant municipalities and political subdivisions of the State of Wisconsin are located in the State of Wisconsin at and near the shoreline of Lake Michigan, as is demonstrated by Exhibit B [omitted], attached to this complaint and made a part hereof. The defendant municipalities and political subdivisions of the State of Wisconsin are now authorizing, causing, permitting, or allowing, and have for a long time heretofore authorized, caused, permitted, or allowed, the discharge of matter and effluents into Lake Michigan, consisting of untreated raw sewage or improperly or inadequately treated sewage, which sewage originates from or within the defendants' respective cities or sanitary sewerage systems, all controlled and operated by the defendant municipalities, their employers, servants, or agents. These matters and effluents discharged into the waters of Lake Michigan are contaminants which cause serious and substantial deterioration in the quality of Lake Michigan waters within the territorial boundaries of the State of Illinois.

7. Said deterioration includes a lessening in the quality of Illinois' Lake Michigan waters as a source of drinking water, body-contact recreation, sailing, fishing, and other legitimate uses of Lake Michigan by the PEOPLE OF THE STATE OF ILLINOIS.

8. The above-described damage to the Lake Michigan territorial waters of the State of Illinois is based upon the following factors:

(a) The sewage and contaminants discharged by or with the consent of the defendant municipalities and political subdivisions of the State of Wisconsin into Lake Michigan frequently are carried by the flow of the waters, natural currents, and atmospheric conditions southward past the Wisconsin-Illinois boundary

and into Illinois territorial waters. The sewage and contaminants thus carried into Lake Michigan territorial waters of Illinois have the above-described damaging effects on Illinois waters. Furthermore, said sewage and contaminants thus carried into Lake Michigan territorial waters of Illinois contain viruses, pathogens, and various types of bacilli which are harmful to human beings and animals, and which can cause organic malfunction and disease in the human body and in animal bodies; hence, they constitute a severe danger to the health, safety, and welfare of the citizens and inhabitants of the State of Illinois, who make use or attempt to make use of the waters of Lake Michigan within the boundaries of Illinois.

(b) The Lake Michigan territorial waters of Illinois and Wisconsin share a mutual aquatic ecology. Damage to aquatic organisms and to water quality in the Wisconsin territorial waters of Lake Michigan will result in a corresponding damaging impact on aquatic organisms and water quality in the Illinois territorial waters of Lake Michigan.

9. The defendant municipalities and political subdivisions of the State of Wisconsin, and each of them, owe a duty to riparian land owners and water users and to the PEOPLE OF THE STATE OF ILLINOIS not to pollute Lake Michigan in the manner heretofore described and owe a further duty to preserve the water quality and ecology of Lake Michigan so as not to endanger the health, safety, and welfare of the citizens and inhabitants of the State of Illinois.

10. The defendant municipalities and political subdivisions of the State of Wisconsin have failed and continue to fail to use proper and approved methods and practices to adequately and properly treat and dispose of the sewage emanating from their localities or originating in the sewer-

age works owned or operated by them; they have thereby neglected to exercise due and proper care and diligence in conducting and carrying out their municipal responsibilities and have thus injuriously affected the rights and legal interests of the citizens and inhabitants of the State of of Illinois.

11. Notwithstanding the fact that the defendant municipalities and political subdivisions of the State of Wisconsin have been repeatedly urged to improve their sewerage systems and to halt the discharge of sewage and contaminants into the waters of Lake Michigan, they have until now failed to do so.

12. The discharge of the sewage and contaminants by defendants into the waters of Lake Michigan, and the consequent carrying of that sewage and contaminants by the natural flow and currents and atmospheric conditions into Illinois territorial waters, and particularly into the waters adjacent to the Illinois shore, causes and constitutes a public nuisance, injuriously affecting the health, safety, and welfare of the citizens and inhabitants of the State of Illinois.

13. To the best of plaintiff's knowledge and belief, the defendant municipalities and political subdivisions of the State of Wisconsin continue and will continue the wrongful act of discharging sewage and contaminants into Lake Michigan unless restrained and enjoined by order of court. Plaintiff has no adequate remedy save that afforded by a court of equity. The injuries to Lake Michigan and to the citizens and inhabitants of Illinois are irreparable, and only an order of this Court can lead to the elimination, or at least the minimizing, of the injuries to plaintiff.

WHEREFORE, plaintiff prays that the Court grant the following relief:

(a) That the Court permanently restrain defendants, and each of them, from discharging raw sewage, or

inadequately or improperly treated sewage, into the waters of Lake Michigan;

(b) That the Court order such further relief as equity may require and as the Court may deem proper or appropriate; and

(c) That the Court tax and assess all costs, including expert witness fees, and scientific study and research costs, against defendants.

Count II

1. This count is brought by the relator, WILLIAM J. SCOTT, Attorney General of the State of Illinois, for and on behalf of the PEOPLE OF THE STATE OF ILLINOIS, pursuant to the terms and provisions of the Illinois "Environmental Protection Act," (*Public Act 76-2429*), approved June 29, 1970, Ill. Rev. Stat. 1971, Ch. 111 ½, § 1001 *et seq.*, wherein and whereby he is empowered to bring actions to enforce the provisions of the aforesaid Act by injunction or recovery of penalties in a civil action, or by both injunction or recovery of penalties.

2.-8. As paragraphs 2 through 8 of Count II, the PEOPLE OF THE STATE OF ILLINOIS incorporate by reference and allege as though fully set forth herein the allegations of paragraphs 2 through 8 of Count II [sic].

9. The discharge into Lake Michigan waters of sewage and contaminants by defendants and the resultant injury to Illinois territorial waters of Lake Michigan described above constitutes "water pollution" as defined in the Illinois Environmental Protection Act, Ill. Rev. Stat. 1971, Ch. 111 ½, § 1003(n), in that said discharge:

". . . is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contami-

nant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life."

10. By causing water pollution in Illinois waters, defendants are in violation of Section 12(a) of the Illinois Environmental Protection Act, Ill. Rev. Stat. 1971, Ch. 111 ½, § 1012(a).

11. Under Section 42 of the Illinois Environmental Protection Act, persons violating the Act by causing water pollution of Illinois waters may be enjoined from continuing such violations upon an action for injunctive relief brought by the Attorney General. Ill. Rev. Stat. 1971, Ch. 111 ½, § 1042.

12. The relator, WILLIAM J. SCOTT, has reason to believe and fears that, unless restrained by order of this Court, defendants will continue to cause, permit or allow raw sewage, or inadequately or improperly treated sewage to be discharged into the waters of Lake Michigan, and that thereby defendants will continue to cause water pollution of the Illinois territorial waters of Lake Michigan.

13. The PEOPLE OF THE STATE OF ILLINOIS are without remedy, save in a court of equity.

WHEREFORE, plaintiff prays that the Court grant the following relief:

(a) That the Court permanently restrain defendants, and each of them, from discharging raw sewage, or inadequately or improperly treated sewage, into the waters of Lake Michigan;

(b) That the Court order such further relief as equity may require and as the Court may deem proper or appropriate; and

(c) That the Court tax and assess all costs, including expert witness fees, and scientific study and research costs, against defendants.

Count III

1. This count is brought by the relator, WILLIAM J. SCOTT, Attorney General of the State of Illinois, for and on behalf of the PEOPLE OF THE STATE OF ILLINOIS, pursuant to the Attorney General's common-law power to seek abatement of a public nuisance by means of a court-imposed injunctive order.

2.-8. As paragraphs 2 through 8 of Count III, the PEOPLE OF THE STATE OF ILLINOIS incorporate by reference and allege as though fully set forth herein the allegations of paragraphs 2 through 8 of Count I.

9. The activities of defendants, in permitting, allowing or causing the discharge of raw sewage, or inadequately or improperly treated sewage, into the waters of Lake Michigan in such a manner as to cause the substantial injuries to the Lake Michigan territorial waters of Illinois, as described above, constitute a public nuisance under the common law of Illinois.

10. The PEOPLE OF THE STATE OF ILLINOIS are without remedy, save in a Court of equity.

WHEREFORE, plaintiff prays that the Court grant the following relief:

(a) That the Court permanently restrain defendants, and each of them, from discharging raw sewage, or inadequately or improperly treated sewage, into the waters of Lake Michigan;

(b) That the Court order such further relief as equity may require and as the Court may deem proper or appropriate; and

(c) That the Court tax and assess all costs, including expert witness fees, and scientific study and research costs, against defendants.

/s/ WILLIAM J. SCOTT
William J. Scott
Attorney General
State of Illinois

OF COUNSEL:
DAVID C. LANDGRAF, Chief
Environmental Control Division

—and—

HARVEY M. SHELDON, Chief
Northern Region
Environmental Control Division

188 West Randolph Street
Suite 2315
Chicago, Illinois 60601
(312) 793-2491

Complaint of State of Michigan

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 72C-1253

PEOPLE OF THE STATE OF ILLINOIS, ex rel. WILLIAM J. SCOTT, Attorney General of the State of Illinois, *Plaintiff*,

PEOPLE OF THE STATE OF MICHIGAN, *Intervening Plaintiff*,

vs.

CITY OF MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF KENOSHA, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF RACINE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF SOUTH MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, a municipality existing under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, *Defendants*.

COMPLAINT

NOW COMES THE PEOPLE OF THE STATE OF MICHIGAN, intervening plaintiff, by their attorney, FRANK J. KELLEY, Attor-

ney General of the State of Michigan and complaining of defendants, CITY OF MILWAUKEE, WISCONSIN, CITY OF KENOSHA, WISCONSIN, CITY OF RACINE, WISCONSIN, CITY OF SOUTH MILWAUKEE, WISCONSIN, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, alleges as follows:

Jurisdiction

1. This matter arises under the Constitution and laws of the United States. The matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs. This Court has jurisdiction of the matter by virtue of 28 USC 1331.

The Parties

2. Intervening plaintiff, the PEOPLE OF THE STATE OF MICHIGAN, is a sovereign state of these United States, comprised of more than 8,875,000 residents as of the 1970 census. Intervening plaintiff is vitally concerned with matters of environmental quality affecting its air, land, and water, and in this regard has enacted comprehensive legislation. The Michigan Water Resources Commission Act, being MCLA 323.1 et seq, MSA 3.521 et seq and the Michigan Water Pollution Control Act of 1970, being MCLA 323.331 et seq, MSA 3.533(201) et seq for example, expresses the concern by the State of Michigan over the pollution of its waters. FRANK J. KELLEY, Attorney General of the State of Michigan, is the chief legal officer for the intervening plaintiff, and in that capacity is empowered to bring, and does bring, this suit on behalf of the intervening plaintiff.

3. The defendants, CITY OF MILWAUKEE, WISCONSIN, CITY OF KENOSHA, WISCONSIN, CITY OF RACINE, WISCONSIN, CITY OF SOUTH MILWAUKEE, WISCONSIN, SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, are municipali-

ties, incorporated under the laws of the State of Wisconsin, political subdivisions thereof and hence citizens of that State. The defendant Sewerage Commission of the City of Milwaukee is charged by law with the duty of collecting, transmitting, and disposing of the City's sewage, while the defendant Metropolitan Sewerage Commission of the County of Milwaukee has the responsibility for the transmission, treatment, and disposal of sewage from territory located within its drainage area.

4. At all times pertinent to this complaint, the State of Michigan has been and now is the owner in trust, for the benefit of its citizens, of the waters of Lake Michigan within the State's territorial boundaries, and the protector and guardian of these waters for the use, needs, and enjoyment of its citizens and inhabitants.

Lake Michigan

5. From ancient geological periods, Lake Michigan has been and now is a natural body of fresh water. It is bordered by the States of Illinois, Wisconsin, Indiana, and Michigan. Lake Michigan has been and is now used as a place of recreation, relaxation, and enjoyment by numerous citizens and inhabitants of the State of Michigan. Additionally, Lake Michigan has been and is now a vital source of public water supply for many municipalities, citizens and inhabitants of the State of Michigan.

The Pollution

6. The defendant municipalities and political subdivisions of the State of Wisconsin are located in the State of Wisconsin at and near the shoreline of Lake Michigan. The defendant municipalities and political subdivisions of the State of Wisconsin are now authorizing, causing, permitting, or allowing, and have for a long time heretofore authorized, caused, permitted, or allowed, the discharge of matter and effluents into Lake Michigan, consisting of un-

treated raw sewage or improperly or inadequately treated sewage, which sewage originates from or within the defendants' respective cities or sanitary sewerage systems, all controlled and operated by the defendant municipalities, their employees, servants, or agents. These matters and effluents discharged into the waters of Lake Michigan are contaminants which cause serious and substantial deterioration to the quality of Lake Michigan waters.

7. Said deterioration includes a lessening in the quality of Lake Michigan's waters as a source of drinking water, body-contact recreation, sailing, fishing, and other legitimate uses of Lake Michigan by the PEOPLE OF THE STATE OF MICHIGAN.

8. The above-described damage to Lake Michigan is based on the following factors:

(a) The sewage and contaminants discharged by or with the consent of the defendant municipalities and political subdivisions of the State of Wisconsin contain viruses, pathogens, and various types of bacilli which are harmful to human beings and animals, and which can cause organic malfunction and disease in the human body and in animal bodies; hence, they constitute a severe danger to the health, safety, and welfare of the citizens and inhabitants of the State of Michigan who make use or attempt to make use of the waters of Lake Michigan.

(b) The Lake Michigan territorial waters of Michigan and Wisconsin share a mutual aquatic ecology. Damage to aquatic organisms and to water quality in the Wisconsin territorial waters of Lake Michigan will result in a corresponding damaging impact on aquatic organisms and water quality in the Michigan territorial waters of Lake Michigan.

9. The defendant municipalities and political subdivisions of the State of Wisconsin, and each of them, owe a

duty to riparian land owners and water users and to the PEOPLE OF THE STATE OF MICHIGAN not to pollute Lake Michigan in the manner heretofore described and owe a further duty to preserve the water quality and ecology of Lake Michigan so as not to endanger the health, safety, and welfare of the citizens and inhabitants of the State of Michigan.

10. The defendant municipalities and political subdivisions of the State of Wisconsin have failed and continue to fail to use proper and approved methods and practices to adequately and properly treat and dispose of the sewage emanating from their localities or originating in the sewerage works owned or operated by them; they have thereby neglected to exercise due and proper care and diligence in conducting and carrying out their municipal responsibilities and have thus injuriously affected the rights and legal interests of the citizens and inhabitants of the State of Michigan.

11. Notwithstanding the fact that the defendant municipalities and political subdivisions of the State of Wisconsin have been repeatedly urged to improve their sewerage systems and to halt the discharge of sewage and contaminants into the waters of Lake Michigan, they have until now failed to do so.

12. The activities of defendants, in permitting, allowing or causing the discharge of raw sewage, or inadequately or improperly treated sewage, into the waters of Lake Michigan in such a manner as to cause substantial injuries to the waters of Lake Michigan, as described above, constitute a public nuisance under the common law of the United States and of Michigan.

13. To the best of plaintiff's knowledge and belief, the defendant municipalities and political subdivisions of the State of Wisconsin continue and will continue the wrongful act of discharging sewage and contaminants into Lake Michigan unless restrained and enjoined by order of court.

Plaintiff has no adequate remedy save that afforded by a court of equity. The injuries to Lake Michigan and to the citizens and inhabitants of Michigan are irreparable, and only an order of this court can lead to the elimination, or at least the minimizing, of the injuries to intervening plaintiff.

The Relief

WHEREFORE, plaintiff prays that the Court grant the following relief:

(a) That the Court permanently restrain defendants, and each of them, from discharging raw sewage, or inadequately or improperly treated sewage, into the waters of Lake Michigan;

(b) That the Court order such further relief as equity may require and as the Court may deem proper or appropriate; and

(c) That the Court tax and assess all costs, including expert witness fees, and scientific study and research costs, against defendants.

FRANK J. KELLEY
Attorney General

/s/ HUGH B. ANDERSON
Hugh B. Anderson
Assistant Attorney General

/s/ CHARLES S. ALPERT
Charles S. Alpert
Assistant Attorney General
Attorneys for Intervening Plaintiff

Business Address:

525 West Ottawa Street
Lansing, Michigan 48913
Phone: 517/373-1129

Dated: June 29, 1972

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 72C-1253

PEOPLE OF THE STATE OF ILLINOIS, ex rel. WILLIAM J. SCOTT, Attorney General of the State of Illinois, *Plaintiff*,

PEOPLE OF THE STATE OF MICHIGAN, *Intervening Plaintiff*,

VS.

CITY OF MILWAUKEE, WISCONSIN, et al., *Defendants*.

NOTICE OF HEARING

To: William J. Scott
Attorney General
State of Illinois
188 West Randolph Street
Suite 2315
Chicago, Illinois 60601

City of Milwaukee
Milwaukee, Wisconsin

City of Kenosha
Kenosha, Wisconsin

City of Racine
Racine, Wisconsin

City of South Milwaukee
South Milwaukee,
Wisconsin

Sewerage Commission of
the City of Milwaukee
Milwaukee, Wisconsin

The Metropolitan Sewerage
Commission of the
County of Milwaukee
Milwaukee, Wisconsin

PLEASE TAKE NOTICE that a motion of the State of Michigan for leave to intervene as party plaintiff, of which the annexed is a true copy, will be brought on for hearing before the United States District Court for the Northern

District of Illinois, Eastern Division, at a date, time and place to be set by the Court.

FRANK J. KELLEY
Attorney General

/s/ HUGH B. ANDERSON
Hugh B. Anderson
Assistant Attorney General

/s/ CHARLES ALPERT
Charles S. Alpert
Assistant Attorney General

Attorneys for Intervening Plaintiff

Business Address:

525 West Ottawa Street
Lansing, Michigan 48913
Phone: 517/373-1129

Dated: June 29, 1972

Answer of the Metropolitan Sewage Commission of the County of Milwaukee to Illinois' Complaint

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Civil Action No. 72-C-1253

PEOPLE OF THE STATE OF ILLINOIS ex rel. WILLIAM J. SCOTT, Attorney General of the State of Illinois, *Plaintiff*,
PEOPLE OF THE STATE OF MICHIGAN, *Intervening Plaintiff*,

v.

CITY OF MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF KENOSHA, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF RACINE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF SOUTH MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, a municipality existing under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof,
Defendants.

ANSWER OF THE DEFENDANT, METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE TO THE STATE OF ILLINOIS

For its Answer to the Complaint of the State of Illinois, the Metropolitan Sewerage Commission of the County of Milwaukee by Schroeder, Gedlen, Riester & Moerke, its attorneys, admits, denies and alleges the following:

Count I

1. Admits the allegations of paragraph 1 of the Complaint.

2. Admits that the State of Illinois is a sovereign state of the United States and is comprised of more than 11 million citizens; alleges it is without sufficient knowledge or information upon which to form a reasonable belief as to the truth of each and every other allegation of Paragraph 2 of the Complaint and therefore denies them and puts plaintiff to its proof thereof.

3. Admits that the cities of Milwaukee, Kenosha, Racine, and South Milwaukee are cities duly incorporated under the laws of Wisconsin; denies each and every other allegation of Paragraph 3 of the Complaint.

4. Denies each and every allegation of Paragraph 4 of the Complaint.

5. Admits that Lake Michigan is a natural body of fresh water bordered by the states named; alleges it is without sufficient knowledge or information upon which to form a reasonable belief as to the truth of each and every other allegation of Paragraph 5 of the Complaint and therefore denies each of them and puts plaintiff to its proof thereof.

6. Admits that Exhibit B accurately shows the general geographic location of each defendant in relation to the shoreline of Lake Michigan; denies each and every other allegation of Paragraph 6 of the Complaint.

7. Denies each and every allegation of Paragraphs 7, 8, 9, 10, 11, 12 and 13 of the Complaint.

Count II

1. Alleges it is without sufficient knowledge or information upon which to form a reasonable belief as to the truth of the allegations of Paragraph 1 and therefore denies same and puts plaintiff to its proof thereof.

2-8. Realleges and incorporates by reference as if fully set forth herein its responses to the allegations of Paragraphs 2-8 of Count I of the Complaint.

9. Denies each and every allegation of Paragraphs 9 and 10 of the Complaint.

10. Alleges it is without sufficient knowledge or information upon which to form a reasonable belief as to the truth of the allegations of Paragraph 11 of the Complaint and therefore denies same and puts plaintiff to its proof thereof.

11. Denies each and every allegation of Paragraph 12 of the Complaint.

Count III

1. Alleges it is without sufficient knowledge or information upon which to form a reasonable belief as to the truth of the allegations of Paragraph 1 of the Complaint and therefore denies same and puts plaintiff to its proof thereof.

2. Realleges and incorporates by reference as if fully set forth herein its responses to Paragraphs 2-8 of Count I of the Complaint.

9. Denies each and every allegation of Paragraphs 9 and 10 of the Complaint.

AFFIRMATIVE DEFENSES

For affirmative defenses to the allegations of the Complaint, this defendant alleges that:

I

THIS DEFENDANT EXERCISES NO RELEVANT LEGAL POWERS OR DUTIES AND HAS DONE NO ACT RELEVANT TO THE COMPLAINT.

1. This defendant is a Commission consisting of three members charged by S.59.96, Wisconsin Statutes with performing certain duties specified therein on behalf of the Metropolitan Sewerage District of the County of Milwaukee, which district is a municipal body corporate under the laws of Wisconsin of the type and nature generally classified as a "special purpose district".

2. Defendant's relevant powers and actions are limited by the laws of Wisconsin to the financing and the construction of interceptor sanitary sewers in that part of the Metropolitan Sewerage District located outside of the corporate limits of the City of Milwaukee.

3. Upon completion of the construction of such sewers they are turned over to the Sewerage Commission of the City of Milwaukee for operation and maintenance as required by law.

4. Plans and specifications for sewers to be constructed by this defendant are by law required to be approved by the Sewerage Commission of the City of Milwaukee and the Wisconsin Department of Natural Resources prior to the letting of contracts for their construction.

5. Treatment of wastes collected and transmitted in sewers constructed by this defendant is performed by the Sewerage Commission of the City of Milwaukee

as required by the applicable laws of the State of Wisconsin.

6. This defendant does not own or have otherwise subject to its direction and control any operating sewers or sewer systems or otherwise collect or transmit sanitary, industrial or other waste effluents.

II

PLAINTIFF IS ITSELF GUILTY OF CONDUCT SUCH AS IS COMPLAINED OF.

1. Upon information and belief there have existed and do exist substantial sources of wastes within the State of Illinois which contaminate the waters of Lake Michigan in the manner complained of in the Complaint.
2. Upon information and belief from time to time the winds and other geophysical conditions cause waters of Lake Michigan to travel in a Northerly direction conveying said wastes from Illinois waters to Wisconsin waters interfering with the use of Wisconsin waters for recreation and public and other water supply.
3. Upon information and belief plaintiff has failed to properly prevent the substantial contamination of and damage to Lake Michigan by waste discharges subject to plaintiff's regulation and control which are a direct and proximate cause of any damage to plaintiff of the nature complained of.

III

THE CONDUCT OR MALFEASANCE OF PLAINTIFF AND OTHERS IS AN INTERVENING PROXIMATE CAUSE OF ANY DAMAGE TO PLAINTIFF.

1. Upon information and belief, waste discharges emanating and continuing to emanate from sources within

the State of Indiana which the regulatory officials at the State of Indiana have neglected or otherwise failed to properly control or prevent have contaminated and damaged the waters of Lake Michigan and are a direct and proximate cause of any damage to plaintiff of the nature complained of.

2. Upon information and belief waste discharges emanating and continuing to emanate from sources within the State of Michigan which the regulatory officials of the State of Michigan have neglected or otherwise failed to control or prevent have contaminated and damaged the waters of Lake Michigan and are a direct and proximate cause of any damage to plaintiff of the nature complained of.

3. Upon information and belief waste discharges emanating and continuing to emanate from sources within the State of Illinois which the regulatory officials of the State of Illinois have neglected or otherwise failed to properly control or prevent have contaminated or damaged Lake Michigan and are a direct and proximate cause of any damage to plaintiff of the nature complained of.

IV

PLAINTIFF HAS SUBSTANTIALLY VIOLATED ITS RIPARIAN DUTIES AND HAS APPROPRIATED AN UNREASONABLE AND INEQUITABLE SHARE OF THE USE OF LAKE MICHIGAN TO ITSELF.

1. Upon information and belief use of Wisconsin waters of Lake Michigan for recreation, water supply and transportation have been and continue to be substantially impaired and damaged by the illegal diversion of substantial quantities of water from Lake Michigan by the City of Chicago with the knowledge, authorization and consent of plaintiff.

2. Upon information and belief the diversion of water from Lake Michigan by and for the City of Chicago is a direct and proximate cause of any transportation and concentration of wastes originating in other states in Illinois waters in the manner complained of.

3. Upon information and belief the political subdivisions and citizens of the State of Illinois have made unreasonable excessive and illegal appropriations of the waters of Lake Michigan to their own use and benefit and the benefit of plaintiff to the detriment of other riparian users of Lake Michigan by diversion of said waters for purposes other than human consumption, contamination of said waters by discharge of damaging wastes, filling substantial portions of the bed of Lake Michigan inevitably depriving others of the use thereof and otherwise damaging the natural ecology and utility of the waters of Lake Michigan to the great detriment of other riparian users.

V

THIS DEFENDANT HAS COMPLIED WITH ALL KNOWN STANDARDS AND CRITERIA GOVERNING ITS AFFAIRS AND HAS IRREVOCABLY EXPENDED LARGE SUMS IN RELIANCE THEREON; PLAINTIFF IS GUILTY OF LACHES AND IS ESTOPPED THEREBY.

1. This defendant stands in full compliance with all known standards, regulations and orders promulgated by duly empowered regulatory agencies of the United States and the State of Wisconsin.

2. This defendant has completed a substantial portion of its planned construction program to provide sewers to its service area reasonably contemplated to be adequate beyond the year 2000 involving expenditures of vast sums of money and the district has currently budgeted $21,450,000 for new construction expenditures in 1973 in reliance upon all currently known applicable standards and criteria.

3. It is essential to the orderly and efficient conduct of the duties of this defendant pursuant to the laws of Wisconsin that the standards and criteria to be met in the performance of this defendants duties be clear, unequivocal and known prior to the commencement of performance of the construction work.

4. The plans and specifications for all construction work undertaken or planned by this defendant have been filed with and approved by the Wisconsin Department of Natural Resources and its predecessor entities and with the United States Environmental Protection Agency and its predecessor entities and have at all relevant times been matters of public knowledge and record.

5. At no time prior to the commencement of this action did plaintiff make known to this defendant any complaint or dissatisfaction with this defendant's conduct of its statutory affair.

6. It would be unjust, inequitable and substantially wasteful of public funds to impose at this late time new and previously unknown standards and criteria to the work done and being done by this defendant.

VI

USE OF LAKE MICHIGAN FOR DILUTION AND DISPERSION OF MUNICIPAL WASTES IS A REASONABLE RIPARIAN USE OF SUCH LAKE.

1. This defendant has available no reasonable and practical or legal alternative under generally recognized technology except to construct sewers which connect to treatment plants which utilize Lake Michigan for the purpose of ultimately diluting and dispersing treated waste waters.

2. This defendant has no legal direction or control over the treatment facilities to which sewers constructed by it are ultimately connected.

3. The use of the waters of Lake Michigan for dilution and dispersion of wastes originating in sewers constructed by this defendant (which are operated, regulated and maintained by others) is of great and overriding necessity and importance to the protection of the health, safety and general welfare of the public and is reasonable in relation to such alteration of the physical, chemical or biological properties of such waters as may directly and proximately result therefrom, if any, and the uses of such waters by others, including citizens and political subdivisions of plaintiff.

VII

FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 VEST PRIMARY JURISDICTION IN UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND ESTABLISHES COMPLETE AND ADEQUATE ADMINISTRATIVE REMEDIES TO PLAINTIFF.

1. The Congress of the United States duly enacted Public Law 92-500 entitled "Federal Water Pollution Control Act Amendments of 1972".

2. Said act became effective on October 18, 1972.

3. Said act sets forth a completely new approach to federal regulation of water pollution premising such regulation upon consideration of the quantity and quality of the effluent discharged by individual sources or categories of similar individual sources and the state of technology of specified points in time, rather than solely upon the desired standard of quality of the receiving waters as in the past.

4. Said act vests in the United States Environmental Protection Agency powers to establish standards and criteria to be imposed upon individual sources of waste discharge and categories of similar individual sources of waste discharge, requires licenses or permits incorporating such standards and criteria as a condition of lawful discharge of waste and establishes administrative and judicial procedures for the enhancement of such standards.

5. Lake Michigan is a federally navigable water.

6. All sources of waste discharge into Lake Michigan are subject to said act.

7. Said act establishes that national policy is to regulate waste discharge in a comprehensive, planned manner coordinating federal and state financial investment with regulatory programs.

8. A United States District Court may adjudicate only those controversies properly brought before it.

9. The United States Environmental Protection Agency has available to it powers, funds and scientific and policy making expertise not available to this court or to the parties to this litigation.

10. The legal remedy sought by plaintiff in this action can be accomplished by the United States Environmental Protection Agency.

11. It is in the best interests of the parties, of the general public and of justice that the control of waste discharges into Lake Michigan be accomplished by the United States Environmental Protection Agency in a comprehensive manner regulating similarly all these similarly situated utilizing the expertise and scientific resources available, rather than for the courts to determine such matters by adjudicating these cases brought before them.

12. Said act would permit plaintiff to seek judicial remedies against any defendant which failed to comply with the requirements of the Environmental Protection Agency or against the Environmental Protection Agency in the event it believes it has been aggrieved by the administrative action or inaction by the Environmental Protection Agency.

ATTORNEY FOR METROPOLITAN SEWERAGE COMMISSION:

/s/ EWALD L. MOERKE, JR.
Ewald L. Moerke, Jr.
Schroeder, Gedlen, Riester & Moerke
108 West Wells Street
Milwaukee, Wisconsin 53203
Tele: 272-4060

Answer of the Metropolitan Sewage Commission of the County of Milwaukee to Michigan's Complaint

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Civil Action No. 72-C-1253

PEOPLE OF THE STATE OF ILLINOIS, ex rel. WILLIAM J. SCOTT, Attorney General of the State of Illinois, *Plaintiff*,
PEOPLE OF THE STATE OF MICHIGAN, *Intervening Plaintiff*,

v.

CITY OF MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF KENOSHA, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF RACINE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF SOUTH MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, a municipality existing under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof,
Defendants.

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ANSWER OF METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, DEFENDANT HEREIN, TO THE COMPLAINT OF THE INTERVENING PLAINTIFF, PEOPLE OF THE STATE OF MICHIGAN

For its Answer to the Complaint of the State of Michigan, the Metropolitan Sewerage Commission of the County of Milwaukee by Schroeder, Gedlen, Riester & Moerke, its attorneys, admits, denies and alleges the following:

Count I

1. Admits the allegations of paragraph 1 of the Complaint.

2. Admits that the State of Michigan is a sovereign state of the United States and is comprised of more than 8 million citizens; alleges it is without sufficient knowledge or information upon which to form a reasonable belief as to the truth of each and every other allegation of Paragraph 2 of the Complaint and therefore denies them and puts plaintiff to its proof thereof.

3. Admits that the cities of Milwaukee, Kenosha, Racine, and South Milwaukee are cities duly incorporated under the laws of Wisconsin; denies each and every other allegation of Paragraph 3 of the Complaint.

4. Denies each and every allegation of Paragraph 4 of the Complaint.

5. Admits that Lake Michigan is a natural body of fresh water bordered by the states named; alleges it is without sufficient knowledge or information upon which to form a reasonable belief as to the truth of each and every other allegation of Paragraph 5 of the Complaint and therefore denies each of them and puts plaintiff to its proof thereof.

6. Admits that Exhibit B accurately shows the general geographic location of each defendant in relation to the

shoreline of Lake Michigan; denies each and every other allegation of Paragraph 6 of the Complaint.

7. Denies each and every allegation of Paragraphs 7, 8, 9, 10, 11, 12 and 13 of the Complaint.

Count II

1. Alleges it is without sufficient knowledge or information upon which to form a reasonable belief as to the truth of the allegations of Paragraph 1 and therefore denies same and puts plaintiff to its proof thereof.

2-8. Realleges and incorporates by reference as if fully set forth herein its responses to the allegations of Paragraphs 2-8 of Count I. of the Complaint.

9. Denies each and every allegation of Paragraphs 9 and 10 of the Complaint.

10. Alleges it is without sufficient knowledge or information upon which to form a reasonable belief as to the truth of the allegations of Paragraph 11 of the Complaint and therefore denies same and puts plaintiff to its proof thereof.

11. Denies each and every allegation of Paragraph 12 of the Complaint.

Count III

1. Alleges it is without sufficient knowledge or information upon which to form a reasonable belief as to the truth of the allegations of Paragraph 1 of the Complaint and therefore denies same and puts plaintiff to its proof thereof.

2. Realleges and incorporates by reference as if fully set forth herein its responses to Paragraphs 2-8 of Count I of the Complaint.

9. Denies each and every allegation of Paragraphs 9 and 10 of the Complaint.

AFFIRMATIVE DEFENSES

For affirmative defenses to the allegations of the Complaint, this defendant alleges that:

I

THIS DEFENDANT EXERCISES NO RELEVANT LEGAL POWERS OR DUTIES AND HAS DONE NO ACT RELEVANT TO THE COMPLAINT.

1. This defendant is a Commission consisting of three members charged by S.59.96, Wisconsin Statutes with performing certain duties specified therein on behalf of the Metropolitan Sewerage District of the County of Milwaukee, which district is a municipal body corporate under the laws of Wisconsin of the type and nature generally classified as a "special purpose district".

2. Defendant's relevant powers and actions are limited by the laws of Wisconsin to the financing and the construction of interceptor sanitary sewers in that part of the Metropolitan Sewerage District located outside of the corporate limits of the City of Milwaukee.

3. Upon completion of the construction of such sewers they are turned over to the Sewerage Commission of the City of Milwaukee for operation and maintenance as required by law.

4. Plans and specifications for sewers to be constructed by this defendant are by law required to be approved by the Sewerage Commission of the City of Milwaukee and the Wisconsin Department of Natural Resources prior to the letting of contracts for their construction.

5. Treatment of wastes collected and transmitted in sewers constructed by this defendant is performed by the Sewerage Commission of the City of Milwaukee

as required by the applicable laws of the State of Wisconsin.

6. This defendant does not own or have otherwise subject to its direction and control any operating sewers or sewer systems or otherwise collect or transmit sanitary, industrial or other waste effluents.

II

PLAINTIFF IS ITSELF GUILTY OF CONDUCT SUCH AS IS COMPLAINED OF.

1. Upon information and belief there have existed and do exist substantial sources of wastes within the State of Michigan which contaminate the waters of Lake Michigan in the manner complained of in the Complaint.
2. Upon information and belief from time to time the winds and other geophysical conditions cause waters of Lake Michigan to travel in a Northerly direction conveying said wastes from Illinois waters to Wisconsin waters interfering with the use of Wisconsin waters for recreation and public and other water supply.
3. Upon information and belief plaintiff has failed to properly prevent the substantial contamination of and damage to Lake Michigan by waste discharges subject to plaintiff's regulation and control which are a direct and proximate cause of any damage to plaintiff of the nature complained of.

III

THE CONDUCT OR MALFEASANCE OF PLAINTIFF AND OTHERS IS AN INTERVENING PROXIMATE CAUSE OF ANY DAMAGE TO PLAINTIFF.

1. Upon information and belief, waste discharges emanating and continuing to emanate from sources within

the State of Indiana which the regulatory officials at the State of Indiana have neglected or otherwise failed to properly control or prevent have contaminated and damaged the waters of Lake Michigan and are a direct and proximate cause of any damage to plaintiff of the nature complained of.

2. Upon information and belief waste discharges emanating and continuing to emanate from sources within the State of Michigan which the regulatory officials of the State of Michigan have neglected or otherwise failed to control or prevent have contaminated and damaged the waters of Lake Michigan and are a direct and proximate cause of any damage to plaintiff of the nature complained of.

3. Upon information and belief waste discharges emanating and continuing to emanate from sources within the State of Illinois which the regulatory officials of the State of Illinois have neglected or otherwise failed to properly control or prevent have contaminated or damaged Lake Michigan and are a direct and proximate cause of any damage to plaintiff of the nature complained of.

IV

THIS DEFENDANT HAS COMPLIED WITH ALL KNOWN STANDARDS AND CRITERIA GOVERNING ITS AFFAIRS AND HAS IRREVOCABLY EXPENDED LARGE SUMS IN RELIANCE THEREON; PLAINTIFF IS GUILTY OF LACHES AND IS ESTOPPED THEREBY.

1. This defendant stands in full compliance with all known standards, regulations and orders promulgated by duly empowered regulatory agencies of the United States and the State of Wisconsin.

2. This defendant has completed a substantial portion of its planned construction program to provide sewers to its service area reasonably contemplated to be ade-

quate beyond the year 2000 involving expenditures of vast sums of money and the district has currently budgeted $21,450,000 for new construction expenditures in 1973 in reliance upon all currently known applicable standards and criteria.

3. It is essential to the orderly and efficient conduct of the duties of this defendant pursuant to the laws of Wisconsin that the standards and criteria to be met in the performance of this defendants duties be clear, unequivocal and known prior to the commencement of performance of the construction work.

4. The plans and specifications for all construction work undertaken or planned by this defendant have been filed with and approved by the Wisconsin Department of Natural Resources and its predecessor entities and with the United States Environmental Protection Agency and its predecessor entities and have at all relevant times been matters of public knowledge and record.

5. At no time prior to the commencement of this action did plaintiff make known to this defendant any complaint or dissatisfaction with this defendant's conduct of its statutory affair.

6. It would be unjust, inequitable and substantially wasteful of public funds to impose at this late time new and previously unknown standards and criteria to the work done and being done by this defendant.

V

USE OF LAKE MICHIGAN FOR DILUTION AND DISPERSION OF MUNICIPAL WASTES IS A REASONABLE RIPARIAN USE OF SUCH LAKE.

1. This defendant has available no reasonable and practical or legal alternative under generally recognized

technology except to construct sewers which connect to treatment plants which utilize Lake Michigan for the purpose of ultimately diluting and dispersing treated waste waters.

2. This defendant has no legal direction or control over the treatment facilities to which sewers constructed by it are ultimately connected.

3. The use of the waters of Lake Michigan for dilution and dispersion of wastes originating in sewers constructed by this defendant (which are operated, regulated and maintained by others) is of great and overriding necessity and importance to the protection of the health, safety and general welfare of the public and is reasonable in relation to such alteration of the physical, chemical or biological properties of such waters as may directly and proximately result therefrom, if any, and the uses of such waters by others, including citizens and political subdivisions of plaintiff.

VI

FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 VEST PRIMARY JURISDICTION IN UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND ESTABLISHES COMPLETE AND ADEQUATE ADMINISTRATIVE REMEDIES TO PLAINTIFF.

1. The Congress of the United States duly enacted Public Law 92-500 entitled "Federal Water Pollution Control Act Amendments of 1972".

2. Said act became effective on October 18, 1972.

3. Said act sets forth a completely new approach to federal regulation of water pollution premising such regulation upon consideration of the quantity and quality of the effluent discharged by individual sources or categories of similar individual sources and the state of technology of specified points in time, rather

than solely upon the desired standard of quality of the receiving waters as in the past.

4. Said act vests in the United States Environmental Protection Agency powers to establish standards and criteria to be imposed upon individual sources of waste discharge and categories of similar individual sources of waste discharge, requires licenses or permits incorporating such standards and criteria as a condition of lawful discharge of waste and establishes administrative and judicial procedures for the enhancement of such standards.

5. Lake Michigan is a federally navigable water.

6. All sources of waste discharge into Lake Michigan are subject to said act.

7. Said act establishes that national policy is to regulate waste discharge in a comprehensive, planned manner coordinating federal and state financial investment with regulatory programs.

8. A United States District Court may adjudicate only those controversies properly brought before it.

9. The United States Environmental Protection Agency has available to it powers, funds and scientific and policy making expertise not available to this court or to the parties to this litigation.

10. The legal remedy sought by plaintiff in this action can be accomplished by the United States Environmental Protection Agency.

11. It is in the best interests of the parties, of the general public and of justice that the control of waste discharges into Lake Michigan be accomplished by the United States Environmental Protection Agency in a comprehensive manner regulating similarly all these similarly situated utilizing the expertise and scientific

resources available, rather than for the courts to determine such matters by adjudicating these cases brought before them.

12. Said act would permit plaintiff to seek judicial remedies against any defendant which failed to comply with the requirements of the Environmental Protection Agency or against the Environmental Protection Agency in the event it believes it has been aggrieved by the administrative action or inaction by the Environmental Protection Agency.

ATTORNEY FOR METROPOLITAN SEWERAGE COMMISSION:

/s/ EWALD L. MOERKE, JR.
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Answer of City of Milwaukee and the Sewerage Commission of the City of Milwaukee to Illinois' Complaint

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 72 C 1253

PEOPLE OF THE STATE OF ILLINOIS ex rel. WILLIAM J. SCOTT, Attorney General of the State of Illinois, *Plaintiff,*

VS.

CITY OF MILWAUKEE, WISCONSIN, et al., *Defendants.*

ANSWER OF DEFENDANTS CITY OF MILWAUKEE AND SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE TO COMPLAINT OF THE STATE OF ILLINOIS

JAMES B. BRENNAN
City Attorney

HARRY G. SLATER
Special Assistant City Attorney

RICHARD F. MARUSZEWSKI
Assistant City Attorney

MAURICE L. MARKEY
Assistant City Attorney

Attorneys for Defendants City of Milwaukee and Sewerage Commission of the City of Milwaukee

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 72 C 1253

PEOPLE OF THE STATE OF ILLINOIS ex rel. WILLIAM J. SCOTT, Attorney General of the State of Illinois, *Plaintiff*,

v.

CITY OF MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF KENOSHA, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF RACINE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF SOUTH MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, a municipality existing under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, *Defendants.*

ANSWER

NOW COME the CITY OF MILWAUKEE and the SEWERAGE COMMISSION of the CITY OF MILWAUKEE, by their attorneys, who for Answer to the Complaint of Illinois, admit, deny and allege as follows:

Count I

1. Admit paragraph 1.

2. Admit paragraph 2, except defendants deny that the Attorney General of the State of Illinois is empowered to bring this suit on behalf of the plaintiff.

3. Admit paragraph 3, except defendants deny that the Metropolitan Sewerage Commission of the County of Milwaukee has the responsibility for the transmission, treatment and disposal of sewage.

4. Admit paragraph 4 and with respect thereto allege that the State of Wisconsin has been and now is the owner in trust, for the benefit of its citizens, of the waters of Lake Michigan within the State of Wisconsin's territorial boundaries; that it is the protector and guardian of such waters for the use, needs and enjoyment of its citizens and inhabitants; that the rights of the State of Wisconsin, as hereinbefore alleged, inure to the defendants and the residents of the City of Milwaukee and residents of the State of Wisconsin who are served by and benefit from the services and operations of the defendants; that the rights of all residents of the State of Illinois and the State of Wisconsin in and to the waters of Lake Michigan are subserviant [sic] and subordinate to the rights and prerogatives of the United States of America as trustee of Lake Michigan for all the people of the United States.

5. Admit paragraph 5 and with respect thereto allege, upon information and belief, that the currents and waters of Lake Michigan pass and move more frequently, constantly and more substantially in a direction from south to north along and near the shorelines of Illinois, Indiana and Wisconsin.

6. Answering paragraph 6, allege that the defendants, as provided by the statutes and laws of Wisconsin, maintain and operate an efficient sewage treatment system; that said system is constantly being improved, with the aim

of treating all sewage in accordance with the best practical treatment technology; defendants are taking steps to comply with orders of the Department of Natural Resources of the State of Wisconsin prescribing action to be completed by 1977, with the objective of substantially improving water quality; upon information and belief, that such orders are based upon and in accordance with standards and schedules for improvement of water quality for Lake Michigan approved by the government of the United States of America; upon information and belief, that municipalities and sanitary districts created by and existing under the laws of the State of Illinois have been and are now discharging substances and effluent into Lake Michigan substantially consisting of raw sewage, or improperly or inadequately treated sewage; upon information and belief, that the substances and effluent discharged into the waters of Lake Michigan and which have their source in the State of Illinois are contaminants, chemicals or substances which cause serious and substantial deterioration in the quality of Lake Michigan waters; further answering, defendants deny that any of the claimed discharges allegedly attributable to these defendants travels from the city of Milwaukee or the waters abutting the City of Milwaukee to Illinois or the waters abutting Illinois; upon information and belief, that if any pollution exists in Lake Michigan adjacent to the City of Milwaukee, such pollution is dissipated and rendered innocuous and insignificant within a short distance from Milwaukee; that if any substance or effluent does reach the waters of Lake Michigan within the territorial boundaries of the state of Illinois, it is insignificant and innocuous and does not cause serious or substantial deterioration or damage in the quality of such waters within the territorial waters of Illinois and does not affect the use, needs or enjoyment of such water by the citizens and inhabitants of Illinois; if any pollution, damage or deterioration does exist in Illinois waters, it is attributable, either entirely or in substantial part, to municipalities and

sanitary districts of the state of Illinois discharging matter, substances and effluent into Lake Michigan or to other sources not under the control of and not attributable to these defendants; further answering, defendants allege that in the event plaintiff proves, upon the trial of this action, that any substances and effluent travels in the waters of Lake Michigan and reaches the territorial boundaries of the state of Illinois, then and in that event defendants allege that the substances and effluent deposited in Lake Michigan and attributable to sources within the state of Illinois travels in the waters of Lake Michigan from the territorial boundaries of the state of Illinois northward to and reaches the territorial waters of Wisconsin abutting the city of Milwaukee; that in the event such travel does occur, defendants allege that the deposit of such substances and effluent, having their source in Illinois, causes injury and damage to the defendants and the inhabitants of the city of Milwaukee in the same manner and for the same reasons as alleged in the complaint of the plaintiff.

Further answering, allege that the Milwaukee River has its origin approximately 95 miles north of its confluence with Lake Michigan at Milwaukee; that the said Milwaukee River has a total drainage area of approximately 855 square miles located in Milwaukee, Waukesha, Ozaukee, Washington, Fond du Lac, Dodge and Sheboygan Counties; that the Milwaukee River watershed includes the drainage areas of the Menomonee River and Kinnickinnic River which have their origins outside of the city of Milwaukee and the district served by the Sewerage Commission of the City of Milwaukee; that substances and effluent affecting the quality of such rivers is placed in such rivers at points of origin outside of the city of Milwaukee and outside the area which is served by the Sewerage Commission of the City of Milwaukee; that such substances and effluent are not attributable to these defendants; that these defendants have no control over the same; that the afore-

mentioned rivers, in substantial part, by reason of geographic conditions and the terrain which has existed since ancient geological periods, have a natural flow and drain into Lake Michigan; if any pollution, damage or deterioration of Lake Michigan is caused thereby, such pollution, damage or deterioration, if any exists, is not attributable to or caused by defendants.

Further answering, alleges that Exhibit "B" to the complaint of the plaintiff is incomplete in that it does not reflect all the municipalities or other entities using the waters of Lake Michigan or rivers tributary to Lake Michigan for discharge of matter and effluent or for other uses or purposes which effect the quality of such waters.

7. Deny paragraph 7.

8. Answering paragraph 8, deny that any acts or conduct of the defendants cause any damage to the Lake Michigan territorial waters of the State of Illinois; allege that if any sewage is discharged by the defendants into the waters of Lake Michigan, the effects of such sewage are dissipated, rendered innocuous and become insignificant or minimal within a short distance from the City of Milwaukee; repeat and reallege paragraph 6 of this Answer with the same force and effect as though repeated and set forth verbatim in answer to paragraph 8; allege that defendants have not done any act or failed to do any act which affects the health, safety and welfare of the inhabitants of the State of Illinois with respect to use of the waters of Lake Michigan within the boundaries of Illinois; if there is any damage to any aquatic organisms or water quality in Illinois territorial waters of Lake Michigan, which defendants deny, defendants allege the same is attributable to sources within the State of Illinois or other sources over which these defendants do not have control.

9. Answering paragraph 9, allege that defendants' duty with respect to the use of the waters of Lake Michigan is to

use such waters in a reasonable manner; that defendants are using such waters reasonably.

10. Deny paragraph 10; with respect thereto, allege that defendants have used approved methods and practices to treat and dispose of sewage emanating from their localities and over which sewage the said defendants have control; allege that they have exercised diligence in conducting and carrying out their responsibilities in the treatment of sewage under the statutes, laws and rules applicable.

11. Admit that the sewage system of the defendants can be improved; allege that the problem of sewage treatment of municipalities has been substantially aggravated by concentration of industry and population in and near urban areas, including that of the City of Milwaukee; that the method and technology of treatment of sewage is undergoing constant improvement and change; that defendants are improving their sewage treatment systems and making substantial expenditures therefore; allege that the magnitude of pollution throughout the United States requires financial aid of the federal government; that such financial aid has been assured by the federal government; that laws have been recently enacted providing for such aid; allege that defendants are taking steps to comply with water quality standards applicable to Lake Michigan, and schedules of compliance as prescribed by the State of Wisconsin and as approved by the Environmental Protection Agency of the United States under statutes, rules and guidelines now in effect.

12. Deny paragraph 12.

13. Deny paragraph 13.

14. Further answering, defendants deny each and every allegation not heretofore admitted, denied, qualified or otherwise responded to.

AFFIRMATIVE DEFENSES

Further answering and as and for additional defenses to plaintiff's complaint, defendants allege each affirmative defense, in the alternative, as follows:

A. Defendants allege that the State of Illinois is responsible for contributing to and authorizing pollution of Lake Michigan; that various governmental agencies, industrial corporations and citizens and residents of Illinois have been and are being permitted to foul and are fouling the waters of the lake; that this Court should refuse to grant plaintiff relief until plaintiff is free from committing or permitting pollution of such waters; that plaintiff's action should be dismissed and plaintiff should not be permitted to maintain its action against the defendants until plaintiff is able to prove that it is blameless and that it is not causing or substantially contributing to the pollution which it attributes to these defendants.

B. Defendants allege that under all the circumstances, including the size, volume, the "self-cleansing" powers of Lake Michigan, the long standing existing usage of the parties herein, the minimal extent of the injury, if any, the public necessity of the defendants to treat sewage as presently treated, the capabilities of the defendants in the light of other urgent demands made upon the defendants and its taxpayers who are required to bear the cost for the abatement of the alleged pollution, the absence of control over other sources and causes of pollution, the unfavorable geographical terrain of southeastern Wisconsin and the natural flow of the rivers tributary to Lake Michigan and the pollution of Lake Michigan by sources outside of the City of Milwaukee or beyond the territorial waters of Wisconsin, that the actions and conduct of defendants in treatment of sewage are reasonable; that the abatement, techniques and schedules being pursued in the reduction and elimination of the claimed pollution are reasonable, prudent, and practical in the light of the magnitude of the

problems, both engineering and financial, and of changing technology and of all the circumstances.

C. Defendants allege that the claimed pollution of Lake Michigan, if such pollution exists, is substantially attributable to a rapid and substantial concentration and increase in population and industry in urban areas in and near the cities on Lake Michigan and near rivers tributary to and which drain into Lake Michigan; that such augmented population and industry requires additional sewage treatment facilities; that defendants are taking reasonable steps to improve and augment its facilities; that the defendants will sustain unreasonable economic hardship and will be denied due process of law if they are required to expend large sums of money to construct treatment facilities which may become obsolete in a brief period of time by reason of changing technology or advancements in the sciences relating to pollution abatement, while the quality of the waters of Lake Michigan continue to be degraded by others over which defendants have no responsibility or control.

D. Defendants allege that the City of Milwaukee and the Sewerage Commission of the City of Milwaukee are governmental agencies created by the State of Wisconsin; that the said defendants are required to comply with Chapter 144, Wis. Stats., and comply with orders issued to them by the Department of Natural Resources of the State of Wisconsin; that the Department of Natural Resources has issued orders to said defendants with respect to the abatement of pollution of Lake Michigan; that those portions of Lake Michigan which are within the boundaries of the State of Wisconsin are within the jurisdiction of the State of Wisconsin; that the State of Wisconsin is a trustee of such waters for its citizens and inhabitants and has the power to promulgate all laws, rules and orders pertaining to the quality of the waters of Lake Michigan within its jurisdiction; that the said defendants are required by the

Statutes of the State of Wisconsin to comply with and obey all such orders; that orders have been issued as aforesaid and were and are in full force and effect; that the State of Wisconsin has power to enact laws for the abatement of pollution within the State of Wisconsin; defendants have no control or authority over such matters, except as provided by the Statutes of the State of Wisconsin and or as prescribed in orders of the Department of Natural Resources of the State of Wisconsin; that by reason of the foregoing, plaintiff does not have any cause of action or claim for relief against defendants while such State of Wisconsin orders are in effect; that by reason of such orders the State of Wisconsin is a necessary and indispensable party to this action; that defendants are taking steps to comply with such orders.

E. Defendants allege that with respect to abatement of pollution of Lake Michigan and treatment of sewage, defendants are performing essential governmental functions imposed upon the said defendants which are required by the laws and orders of the State of Wisconsin; that by reason thereof, and the legal restrictions placed upon the defendants by the State of Wisconsin as to their taxing and borrowing power, the State of Wisconsin is the real party in interest; that plaintiff's action although brought in form against these defendants is, in fact and law, an action against the State of Wisconsin; that such action presents a direct issue of law as to the force and effect of the sovereignty and statutes of the State of Wisconsin and the orders of the Department of Natural Resources as hereinbefore alleged, and is, therefore, not within the judicial power of this Court by reason of Article XI, U.S. Constitution.

F. Defendants allege that plaintiff has failed to join the State of Wisconsin which is an indispensable party within the meaning of F.R.C.P. 19; that the power to tax and borrow of the City of Milwaukee is prescribed by and

limited by the Statutes of the State of Wisconsin and that the financial capabilities of the City of Milwaukee to perform governmental functions is limited by such State imposed restrictions; that if the State of Wisconsin is not joined, these defendants by reason of the foregoing and the allegations previously set forth in this Answer, will be denied due process of law to which they are entitled under Article XIV, U.S. Constitution and Section 9, Article I, Wisconsin Constitution; that unless the State of Wisconsin is joined as a party to this action, these defendants may be required to perform obligations imposed upon them by the statutes and orders of the State of Wisconsin and which may be different or inconsistent with any requirements which may be imposed on them by the Court in the event the plaintiff should, upon completion of the trial, be held to be entitled to the relief prayed for in its complaint; that the State of Wisconsin has a direct interest in this controversy; that a final decree, if any should be entered herein, directly affects the sovereignty and interests of the State of Wisconsin and the effectiveness and legality of the orders of the State of Wisconsin heretofore referred to.

G. Defendants allege that the public acts and statutes of the State of Wisconsin and the orders and records of the Department of Natural Resources of the State of Wisconsin are entitled to full faith and credit under the provisions of Section 1, Article IV, U.S. Constitution; that the entry of any order or decree by this Court, different or inconsistent with the public acts and statutes of the State of Wisconsin or the orders of said Department of Natural Resources, denies to the State of Wisconsin and these defendants, as governmental agencies of the State of Wisconsin, the full faith and credit to which they are entitled within the meaning of the aforesaid constitutional requirement.

H. That the defendant City of Milwaukee is a municipality which is created under the laws of the State of Wisconsin and owes its existence to the sovereignty of the State of Wisconsin and is bound by the legislative acts of the state relating to sewage disposal which are of statewide concern; that in the event it is established that any pollution does occur in the waters of Lake Michigan which may be attributable to the City of Milwaukee, which the City does not believe at this time is applicable, or related to any of its acts or actions which it can control, the remedy to be provided is one which the defendants are informed and believe would be extremely costly and involve the expenditure of many millions of dollars which the defendant City of Milwaukee is without capacity to secure; that in such event the assistance and authority of the State of Wisconsin and of the Federal Government with respect to grants or allotments would be essential and a matter of vital consequence in the fulfillment of any remedy which may be decreed; that to such extent unless the State of Wisconsin participates in these proceedings, having the overriding legislative and sovereign authority, the defendant City of Milwaukee would be financially powerless to act with respect to extensive and expansive engineering requirements in order to meet or satisfy remedial directives.

I. Defendants allege upon information and belief, that prior to the commencement of this action plaintiff did not make any demand or complaint to the State of Wisconsin or to the Department of Natural Resources of the State of Wisconsin with respect to the claimed pollution of which it complains; that complaint was not made upon these defendants; further alleges that either the Environmental Protection Agency of the United States or the Department of Natural Resources of the State of Wisconsin, under existing law, can provide adequate remedies at law to the plaintiff if such remedies are required; alleges that upon information and belief that prior to the commencement of

this action plaintiff did not seek such administrative remedies and has not exhausted such remedies.

J. Defendants allege that under the provisions of Secs. 62.25 and 895.43, Wis. Stats., no action founded in tort can be maintained against a political corporation or governmental subdivision or agency thereof unless, within 120 days after happening of the event causing the claimed injury or damage, written notice of the time, place and circumstances of the injury or damage is served upon such political corporation, governmental subdivision or agency; that such notice was not served upon defendants; further allege that Sec. 895.43, Wis. Stats., provides that no suit shall be brought against any political corporation, governmental subdivision or any agency thereof for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions; that any acts of the defendants as alleged in plaintiff's complaint, are within the provisions of said statute; that the provisions of the aforementioned statutes and the rights of these defendants thereunder are entitled to full faith and credit under the provisions of Section 1, Article IV, U.S. Constitution.

Count II

1. Answering paragraph 1, deny that the "Environmental Protection Act" (Public Act 76-2429), approved June 29, 1970, Ill. Rev. Stat. 1971, Ch. 111 ½, § 1001, *et seq.*, empowers the relator, William J. Scott, to bring this action to enforce the provisions of the aforementioned Act as therein alleged against the defendants herein; further allege that the aforementioned Act does not have any extraterritorial effect and has no application to the defendants; that the defendants are governmental agencies of the State of Wisconsin and are not subject to the jurisdiction of the State of Illinois or the application of its laws.

2-8. Answering paragraphs 2 through 8 inclusive, reallege paragraphs 2 through 8 inclusive, of the answer of

these defendants to Count I, and incorporate said paragraphs by reference as though fully set forth herein and repeated verbatim as defendants' answer to this Count.

9. Answering paragraph 9, deny that any acts or omissions to act on the part of the defendants are "water pollution" of the waters of the State of Illinois as defined in the Environmental Protection Act hereinabove referred to, if applicable; allege that said Act has no effect or application to the defendants.

10. Deny paragraph 10.

11. Deny paragraph 11; allege that Section 42 of the Illinois Environmental Protection Act has no application to the defendants.

12. Deny any information or belief with respect to paragraph 12 and therefore deny same.

13. Deny paragraph 13.

14. Re-allege all of the affirmative defenses to Count I with the same force and effect as though herein repeated as affirmative defenses to this Count.

15. Further answering defendants deny each and every allegation not heretofore admitted, denied, qualified or otherwise responded to.

Count III

1. Answering paragraph 1, deny that the relator, William J. Scott, has the power under the statutes and the laws of the State of Illinois to commence or maintain this action; allege that if such power did exist under the common law of the State of Illinois, such power was abolished by the statutes of the State of Illinois which pertain to the abatement of water pollution within said state.

2-8. Answering paragraphs 2 through 8 inclusive, reallege paragraphs 2 through 8, inclusive, of the answer of

these defendants to Count II, and incorporate these paragraphs by reference as though fully set forth herein and repeated verbatim as defendants' answer to this Count.

9. Deny paragraph 9.

10. Deny paragraph 10.

11. Re-allege all of the affirmative defenses to Count I with the same force and effect as though herein repeated as affirmative defenses to this Count.

12. Further answering defendants deny each and every allegation not heretofore admitted, denied, qualified or otherwise responded to.

WHEREFORE, defendants pray that the Court grant the following relief:

a) That the Court dismiss the complaint of the plaintiff for the reason that such complaint is insufficient in law and is wanting in equity;

(b) That the complaint of the plaintiff be dismissed for the reason that the plaintiff has an adequate remedy at law and has not exhausted administrative remedies which are available to it and which are adequate, if the Court so determines;

c) That is the event the plaintiff's complaint is dismissed, the Court tax and assess all costs, including expert witness fees and costs of scientific studies and research costs against the plaintiff;

d) In the event the complaint of the plaintiff is not dismissed, the Court make such order as is fair, equitable and just under all of the circumstances and facts existing;

e) In the event the action is not dismissed and a decree or order is made and entered relating to the abatement of pollution of Lake Michigan, such order or

decree be made applicable to all other persons who are contributing to the pollution of Lake Michigan; that all such persons be made subject to the authority of the Court so that any order or decree made and entered be fair and equitable.

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Answer of City of Milwaukee and the Sewerage Commission of the City of Milwaukee to Michigan's Complaint

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 72 C 1253

PEOPLE OF THE STATE OF ILLINOIS, ex rel. WILLIAM J. SCOTT, Attorney General of the State of Illinois, *Plaintiff*,
PEOPLE OF THE STATE OF MICHIGAN, *Intervening Plaintiff*,

VS.

CITY OF MILWAUKEE, WISCONSIN, et al., *Defendants*.

ANSWER OF DEFENDANTS CITY OF MILWAUKEE AND SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE TO COMPLAINT OF THE STATE OF MICHIGAN

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Attorneys for Defendants City of Milwaukee and Sewerage Commission of the City of Milwaukee

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 72 C 1253

PEOPLE OF THE STATE OF ILLINOIS, ex rel. WILLIAM J. SCOTT, Attorney General of the State of Illinois, *Plaintiff*,
PEOPLE OF THE STATE OF MICHIGAN, *Intervening Plaintiff*,

VS.

CITY OF MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF KENOSHA, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF RACINE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF SOUTH MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, a municipality existing under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, *Defendants.*

ANSWER

NOW COME the CITY OF MILWAUKEE and the SEWERAGE COMMISSION of the CITY OF MILWAUKEE, by their attorneys,

who for Answer to the Complaint of the Intervening Plaintiff, STATE OF MICHIGAN, admit, deny and allege as follows:

1. Admit paragraph 1.

2. Admit paragraph 2, except defendants deny that the Attorney General of the State of Michigan is empowered to bring this suit on behalf of the intervening plaintiff.

3. Admit paragraph 3, except defendants deny that the Metropolitan Sewerage Commission of the County of Milwaukee has the responsibility for the transmission, treatment and disposal of sewage.

4. Repeat and incorporate by reference paragraph 4 of the answer to the complaint of Illinois with the same force and effect as though re-alleged verbatim herein, except that wherever the State of Illinois or the territorial waters of the State of Illinois are referred to, the same is intended and deemed in this answer to be applicable to the State of Michigan and the territorial waters of the State of Michigan.

5. Admit paragraph 5.

6. Answering paragraph 6, allege that the defendants, as provided by the statutes and laws of Wisconsin, maintain and operate an efficient sewage treatment system; that said system is constantly being improved, with the aim of treating all sewage in accordance with the best practical treatment technology; defendants are taking steps to comply with orders of the Department of Natural Resources of the State of Wisconsin prescribing action to be completed by 1977, with the objective of substantially improving water quality; upon information and belief, that such orders are based upon and in accordance with standards and schedules for improvement of water quality for Lake Michigan approved by the government of the United States of America; upon information and belief, that municipalities and sanitary districts created by and existing under the laws

of the State of Michigan have been and are now discharging substances and effluent into Lake Michigan substantially consisting of raw sewage, or improperly or inadequately treated sewage; upon information and belief, that the substances and effluent discharged into the waters of Lake Michigan and which have their source in the State of Michigan are contaminants, chemicals or substances which cause serious and substantial deterioration in the quality of Lake Michigan waters; if any pollution, damage or deterioration does exist in Michigan territorial waters, it is attributable, either entirely or in substantial part, to municipalities and sanitary districts of the State of Michigan discharging matter, substances and effluent into Lake Michigan or to other sources not under the control of and not attributable to these defendants.

Further answering, allege that the Milwaukee River has its origin approximately 95 miles north of its confluence with Lake Michigan at Milwaukee; that the said Milwaukee River has a total drainage area of approximately 855 square miles located in Milwaukee, Waukesha, Ozaukee, Washington, Fond du Lac, Dodge and Sheboygan Counties; that the Milwaukee River watershed includes the drainage areas of the Menomonee River and Kinnickinnic River which have their origins outside of the City of Milwaukee and the district served by the Sewerage Commission of the City of Milwaukee; that substances and effluent affecting the quality of such rivers is placed in such rivers at points of origin outside of the City of Milwaukee and outside the area which is served by the Sewerage Commission of the City of Milwaukee; that such substances and effluent are not attributable to these defendants; that these defendants have no control over the same; that the aforementioned rivers, in substantial part, by reason of geographic conditions and the terrain which has existed since ancient geological periods, have a natural flow and drain into Lake Michigan; if any pollution, damage or deterioration of Lake

Michigan is caused thereby, such pollution, damage or deterioration, if any exists, is not attributable to or caused by defendants.

7. Deny paragraph 7.

8. Repeat and incorporate by reference paragraph 8 of the Answer to the Complaint of Illinois with the same force and effect as though re-alleged verbatim herein, except that wherever the State of Illinois or the territorial waters of the State of Illinois are referred to, the same is intended and deemed in this answer to be applicable to the State of Michigan and the territorial waters of the State of Michigan.

9. Answering paragraph 9, allege that defendants' duty with respect to the use of the waters of Lake Michigan is to use such waters in a reasonable manner; that defendants are using such waters reasonably.

10. Deny paragraph 10; with respect thereto, allege that defendants have used approved methods and practices to treat and dispose of sewage emanating from their localities and over which sewage the said defendants have control; allege that they exercised diligence in conducting and carrying out their responsibilities in the treatment of sewage under the statutes, laws and rules applicable.

11. Repeat and incorporate by reference paragraph 11 of the answer to the complaint of Illinois with the same force and effect as though re-alleged verbatim herein.

12. Deny paragraph 12.

13. Deny paragraph 13.

14. Further answering, defendants deny each and every allegation not heretofore admitted, denied, qualified or otherwise responded to.

AFFIRMATIVE DEFENSES

Further answering and as and for additional defenses to intervening plaintiff's complaint, defendants allege each affirmative defense, in the alternative, as follows:

Repeat and incorporate by reference all of the affirmative defenses "A" through "J," inclusive, of the answer to the complaint of Illinois with the same force and effect as though re-alleged verbatim herein, except that wherever the State of Illinois or the territorial waters of the State of Illinois are referred to, the same is intended and deemed in this answer to be applicable to the State of Michigan and the territorial waters of the State of Michigan.

WHEREFORE, defendants pray that the Court grant the following relief:

a) That the Court dismiss the complaint of the intervening plaintiff for the reason that such complaint is insufficient in law and is wanting in equity;

b) That the complaint of the intervening plaintiff be dismissed for the reason that the intervening plaintiff has an adequate remedy at law and has not exhausted administrative remedies which are available to it and which are adequate, if the Court so determines;

c) That in the event the intervening plaintiff's complaint is dismissed, the Court tax and assess all costs, including expert witness fees and costs of scientific studies and research costs against the intervening plaintiff;

d) In the event the complaint of the intervening plaintiff is not dismissed, the Court make such order as is fair, equitable and just under all of the circumstances and facts existing;

e) In the event the action is not dismissed and a decree or order is made and entered relating to the abatement of pollution of Lake Michigan, such order or decree be made

applicable to all other States, entities or persons who are contributing to the pollution of Lake Michigan; that all such States, entities or persons be made subject to the authority of the Court so that any order or decree made and entered be fair and equitable.

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Order of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

(Argued May 24, 1978)

May 26, 1978.

Before Hon. Thomas E. Fairchild, Chief Judge; Hon. Philip W. Tone, Circuit Judge; Hon. Roy W. Harper, Senior District Judge*

No. 77-2246

PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff-Appellee,*

and

PEOPLE OF THE STATE OF MICHIGAN,
Intervening Plaintiff-Appellee,

vs.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Defendants-Appellants.

Appeal of the United States District Court for the Northern District of Illinois, Eastern Division
No. 72-C-1253—John F. Grady, Judge.

ORDER

The panel has determined that an analysis of the appeal, in somewhat further detail than was presented in the briefs of the parties, would aid the panel in its consideration. The panel would like to know the position of the parties with

* Senior District Judge Roy W. Harper of the Eastern and Western Districts of Missouri is sitting by designation.

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respect to the elements required to be proved in order to establish a cause of action for nuisance under federal common law. The panel also seeks assistance in locating the particularized findings of the trial court with respect to such elements and the evidence claimed to support said findings.

Accordingly, the appellees are directed within thirty (30) days from the date of this order to serve and file a memorandum setting forth (1) their position as to the elements required to be proved; (2) the transcript of Judge Grady's oral decision, identifying therein the particularized findings deemed material to such issues, and supplying by footnotes to said transcript record citations of evidence which appellees contend supports such findings; and (3) record citations to evidence which appellees contend supports the reasonableness and necessity of the standards adopted in the final decree.

Appellants may file a responsive memorandum within twenty-one (21) days after the filing of appellees' memorandum.

IT IS SO ORDERED.

Supplemental Memorandum of Plaintiff-Appellee State of Illinois to the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 77-2246

PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff-Appellee,*
and
PEOPLE OF THE STATE OF MICHIGAN,
Intervening Plaintiff-Appellee,

v.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Defendants-Appellants.

Appeal of the United States District Court for the Northern District of Illinois, Eastern Division
Hon. John F. Grady, Presiding

SUPPLEMENTAL MEMORANDUM OF PLAINTIFF-APPELLEE STATE OF ILLINOIS

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INTRODUCTION

This memorandum responds to this Court's order of May 26, 1978[1] and follows the three elements of the Court's order. Part I analyzes and defines a common law public nuisance. Simply put, a public nuisance has been defined as any interference with the right of the community at large. Within this general definition is the principle that actions which endanger or threaten the public health are public nuisances. The case law uniformly speaks in terms of "endanger" the public health or "menace" to the public health as a basis for abatement. The judicial decisions uniformly reject the contention that disease or health injury must actually occur and be proven as a prerequisite to relief.

Basically, the proof in this case goes to the creation of a public health hazard by defendants' discharges of raw and inadequately treated sewage and subsequent transport of the sewage pathogens to Illinois waters. Such health hazards represent a classic common law public nuisance. Moreover, by being a major nutrient contributor to the eutrophication of Lake Michigan, defendants are creating a long-term public nuisance by interfering with the rights of all those who use Lake Michigan to a clear, clean, aesthetically pleasing lake free from objectionable tastes and odors.

Part I also delineates the application of various legal issues to a case of public nuisance. Among these issues are: (a) statutory authorization for actions constituting a pub-

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[1] This order directed appellees to: (1) set forth the elements required to be proved to establish a cause of action for nuisance under federal common law; (2) set forth the transcript of Judge Grady's oral decision identifying the particularized findings deemed material to such issues and to supply transcript record citations of evidence which appellees contend support such evidence; (3) set forth record citations to evidence supporting the reasonableness and necessity of the standards adopted in the final decree.

lic nuisance; (b) balancing public health hazards against economic burdens on the perpetrator; and (c) the burden of proof to be applied.

The courts—including those in Wisconsin—have held that compliance with statutory or regulatory standards is not a defense to a public nuisance charge. They have also refused to balance public health hazards against the convenience of the perpetrator of the nuisance. Finally, the courts have required that proof of a nuisance be by a preponderance of the evidence, rather than some more restrictive standard.

In sum, Illinois, Wisconsin and a host of other states continue to recognize public nuisance as a vital and actively needed legal mechanism to protect the public health and welfare.

In Part II of this memorandum, plaintiffs lay out the contents of Judge Grady's findings of fact and cite record references in support of those findings. The evidence supports the following points:

Public Health Hazard

1. The evidence is unequivocal that defendants discharge enormous quantities of raw and improperly treated sewage into Lake Michigan.

2. These masses of human fecal wastes contain billions of pathogenic (disease-causing) organisms—bacteria and viruses.

3. These organisms can cause numerous serious diseases of the heart (e.g. myocarditis), lungs (e.g. pleurodynia), liver (e.g. hepatitis) and other organs as well as birth defects in children.

4. Shore parallel currents which move in response to wind and temperature regimes in Lake Michigan have sufficient speed and persistence to carry materials discharged

at Milwaukee the distance to Illinois in as little as two and one-half days.

5. The pathogens remain live and infectious for varying periods of time. Shigella and Salmonella (bacteria) will survive four to eight days or more, depending on the temperature of the water. Viruses will survive for periods ranging from two weeks to several months.

6. While the pathogens will be somewhat diluted by a process known as diffusion, a large mass of polluted water will dilute slowly from the edges inward. Thus, much of the dirty water in the center mixes with other dirty water. The result of this slow dilution is that hazardous concentrations of pollutants will still be present in Illinois waters.

7. Even if there was extensive dilution, water treatment plants would reconcentrate the pathogens on their intake filters, creating a health risk under normal operations and a substantial health risk if a breakdown or malfunction occurs.

8. A health risk also exists for swimmers who are exposed to such pathogens.

Eutrophication

9. Milwaukee's sewage is also contributing to the eutrophication of Lake Michigan. Eutrophication is a process whereby a clear, clean, oligotrophic lake becomes cloudy and murky from the growth of suspended plant life.

10. As a lake becomes more eutrophic, objectionable plant life increases and when such plant life dies, it releases objectionable odors. Obnoxious forms of plant life are also responsible for taste and odor problems in public water supplies. This process of eutrophication also has a long-term adverse impact on fish spawning areas.

11. Sewage contributes two key components to this problem. Sewage contains a whole series of nutrients—"a rich

nutrient broth"—for aquatic plant growth. Sewage also contributes phosphorus, the key nutrient to plant growth in Lake Michigan.

12. Milwaukee's treatment plants alone discharge over one million pounds of phosphorus per year—over 50% of the sewage load of phosphorus into Lake Michigan. No one knows how much additional phosphorus is discharged by Defendants' raw sewage overflows.

Part III of this memorandum sets forth the record citations supporting the standards imposed by Judge Grady's order. The defendants have already stipulated to the feasibility of these standards, and the basic purpose of Part III is to provide record support for the need and reasonableness of such standards. Basically the following evidential points support Judge Grady's ordered treatment:

1. Raw sewage should not be discharged into Lake Michigan, but should be collected, stored in retention facilities if necessary, and treated prior to being discharged.

2. Destruction of pathogenic organisms requires effective chlorination by free chlorine.

3. Solid materials encapsulate and shield pathogens from disinfection by the chlorine.

4. Organic materials, commonly measured as Biochemical Oxygen Demand ("BOD"), combine with chlorine to form weak, ineffective disinfectants called combined chlorine, thus allowing vast numbers of pathogens to pass through the treatment plant.

5. In order to expose the pathogens to effective chlorination, the solids must be removed to very low levels prior to chlorination; and in order to maintain a free chlorine—as opposed to a combined chlorine—BOD (organic material) also must be removed to as low a level as possible prior to chlorination. These levels should not exceed 5 milligrams per liter solids or 5 milligrams per liter BOD.

Moreover, a measurement of chlorine effectiveness, known as a free chlorine residual, must be maintained at all times.

6. The 5 milligrams per liter solids and 5 milligrams per liter BOD can be achieved by adding coagulation/sedimentation tanks and filters onto the existing secondary plants.

7. Milwaukee now discharges up to a million pounds of phosphorus annually, which represents 50% of the sewage discharge of phosphorus to Lake Michigan. Milwaukee plants will continue to discharge a phosphorus load of a million pounds even if a concentration of 1 milligram per liter for phosphorus is achieved.

8. An incidental but major benefit of the 5 milligrams per liter solids/5 milligrams per liter BOD standard is a reduction in phosphorus concentrations well below 1 milligram per liter.

I

THE ELEMENTS OF COMMON LAW PUBLIC NUISANCE

A

The Historical Background—Protection Of The Rights Of The Community At Large

In *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972), the Supreme Court held that "federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution." 406 U.S. at 107. While the Supreme Court clearly established the subject matter jurisdiction of the federal district courts to hear such cases under the federal question jurisdiction of 28 U.S.C. § 1331, the Court did not delineate the substantive elements necessary to establish liability under the common law of public nuisance.

The Court gave limited guidance:

> "While federal law governs, consideration of state standards may be relevant [citation omitted]. Thus a

> State with high water-quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor. There are no fixed rules that govern; these will be equity suits in which the informed judgment of the chancellor will govern."
>
> 406 U.S. 107-108.

While federal substantive law would apply, the courts should consider local conditions in determining the remedies necessary. Some locations would require more stringent remedies than others.

> "Moreover, geophysical characteristics which define local and regional airsheds are often significant considerations in determining the steps necessary to abate air pollution [citation omitted]. Thus, measures which might be adequate to deal with pollution in a city such as San Francisco, might be grossly inadequate in a city such as Phoenix, where geographical and meteorological conditions trap aerosols and particulates.
>
> "As a matter of law as well as practical necessity corrective remedies for air pollution, therefore, necessarily must be considered in the context of localized situations."
>
> *Washington* v. *General Motors Corp.*, 406 U.S. 109, 115-16 (1972)[2]

Fortunately, the Supreme Court in other cases—usually in dicta—has indicated that it follows the common law of public nuisance established in England and the American

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[2] *Washington* v. *General Motors Corp.* was decided by the Supreme Court on the same day as *Illinois* v. *Milwaukee*, and held that the states could bring federal common law nuisance suits to abate pollution of ambient air. 406 U.S. at 112 n.2.

states.[3] *See generally, Ohio* v. *Wyandotte Chemical Corp.*, 401 U.S. 493, 510 (1971) (dissenting opinion of Justice Douglas);[4] *United Steelworkers of America* v. *United States*, 361 U.S. 39, 60-61 (1959) (concurring opinion of Justices Frankfurter and Harlan); *Mugler* v. *Kansas*, 123 U.S. 623, 672-73 (1887); *City of Georgetown* v. *The Alexandria Canal Company*, 37 U.S. (12 Pet.) 91, 97-98 (1838); *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 54 U.S. (13 How.) 519, 563-568 (1851).[5]

Turning to the common law of England, public nuisances can be traced to the 12th Century. At that time, interferences or obstructions to the King's highways were abatable

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[3] Unlike the varying state laws regarding water usage which have confronted the Supreme Court in water rights appropriation cases (e.g., *Kansas* v. *Colorado*, 206 U.S. 46 (1907)), the laws of the various states regarding the substantive elements of common law nuisance are relatively uniform.

[4] "In light of the history of water pollution control efforts in this country it cannot be denied that a vast residual authority rests in the States. And there is no better established remedy in state law than authority to abate a nuisance.[5] "

[5] 2 W. Blackstone; Commentaries *218 (Cooley 4th ed. 1899): "[I]t is a nuisance to stop or divert water that used to run to another's meadow or mill; to corrupt or poison a watercourse, by erecting a dyehouse or a lime-pit for the use of trade, in the upper part of the stream; or in short to do any act therein that in its consequences must necessarily tend to the prejudice of one's neighbour. So closely does the law of England enforce that excellent rule of gospel morality, of 'doing to others as we would they should do unto ourselves.' " (401 U.S. 493, at 510 n.5)

[5] The distinctions made in these decisions between nuisances tried at law and nuisances tried in equity were once very significant and account for much of the historical confusion over differential standards of proof, discussed *infra*.

as public nuisances by criminal indictment and trial by jury.[6]

By the time of Blackstone's lectures some six centuries later, the law remained that public nuisances were a crime.[7] The remedy for such public nuisance was by indictment and trial by jury; and if convicted, the defendant was required to abate the nuisance. IV Blackstone *166. Blackstone defined the crime of public nuisance as follows:

> "Common nuisances are a species of offenses against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires."[8]

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[6] Glanville, *A Treatise on the Laws and Customs of the King of England* (circa 1189 A.D.), *A Translation of Glanville by Beame* (1900)), p. 194:

> "And, generally speaking, whenever a Nuisance is committed affecting the King's Lands, or the Kings High Way, or a City, the suit concerning it belongs to the Kings' Crown. But Purprestures of this description are enquired after, either in the King's Chief Court, or before his Justices sent into the different parts of the Kingdom for the purpose of making such Inquisitions, by a Jury of the Place, or Vicinage. And if, by such Jury, a man be convicted of having made any Purpresture of this kind, he shall be amerced to the King to the extent of the whole Fee that he holds of him, and shall restore that which he has encroached upon; . . ."

[7] "And nuisances are of two kinds: public or common nuisances, which affect the public and are an annoyance to all the King's subjects; for which reason we must refer them to the class of public wrongs, or crimes and misdemeanors. . . ." III Cooley's *Blackstone Commentaries on the Laws of England* *215 (3d ed. 1884) (hereinafter "Blackstone").

[8] IV Blackstone *166. Among such common or public nuisances were "annoyances in highways, bridges and public rivers by rendering the same inconvenient or dangerous to pass, either positively, by actual obstructions or negatively by want or reparations." *Id.*

Stephens defines public or common nuisance as follows:

> "A common nuisance is an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all His Majesty's subjects." [9]

He goes on to classify as a public nuisance acts which endanger the health of the public:

> "Every person commits a common nuisance who does anything which endangers the health, life, or property of the public or any part of it." [10]

Hawkins, in *Pleas of the Crown,* (8th ed. 1824)[11] also describes a hazard to public health as a common nuisance:

> "Also it hath been holden to be a common nuisance to divide a house in a town for poor people to inhabit in, by reason whereof it will be more dangerous in time of infection of the plague."
>
> *Id.*, at 694

The principle that a hazard to the public health constitutes a public nuisance is well established in the common law of the states in America.

In *Attorney General* v. *Jamaica Pond Aquaduct,* 133 Mass. 361 (1882), the state obtained an injunction to prevent the drawing down of the Jamaica Pond, which would expose large areas of slime, mud and offensive vegetation.

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[9] Stephens, *A Digest of the Criminal Law* (7th ed. 1926), p. 178.

[10] *Id.*, at 186. Stephens gives the following illustration of a health hazard constituting a public nuisance:

> "A carries a child infected with the small-pox along a public highway in which persons are passing, and near to inhabited houses. A commits a common nuisance." *Id.*, at 187.

[11] First published in 1721.

A nuisance was found because draining the pond would expose its shores "thus endangering the public health." 133 Mass. at 363.

In *City of Ludlow* v. *Commonwealth*, 56 S.W.2d 958 (Ky. Ct. App. 1933), the court stated:

> "[N]o rule of law is better settled than that whatever *endangers* public health is a public nuisance." 56 S.W. 2d at 959 (emphasis added).

The Pennsylvania Supreme Court held that the common law public nuisance included health hazards in *Commonwealth ex rel. Schumaker* v. *New York and Pa. Co.*, 367 Pa. 40, 79 A.2d 439 (1951), stating:

> "Corruption of water, when it affects the public use of a stream or *menaces* the public health, becomes a public nuisance which the commonwealth may suppress by criminal proceedings upon indictment for maintaining a public nuisance and upon conviction the court may in its sentence include an order requiring abatement of the nuisance. See Barclay v. Commonwealth, 1855, 25 Pa. 503. Also the Commonwealth may proceed in equity for an injunction requiring abatement of the nuisance."
>
> 79 A.2d at 444 (emphasis added)[12]

In *Mitchell Realty Co.* v. *City of West Allis*, 184 Wis. 352, 199 N.W. 390 (1924), a private landowner sued West Allis, a city contiguous to Milwaukee, for damages and to abate a nuisance caused by defendant's sewage inundating her land. The City of Milwaukee was allowed to join in the action as a plaintiff to demand abatement of the sewage discharges, because the stream into which the defendant discharged its sewage flowed past a Milwaukee city park. The

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[12] *Webster's New World Dictionary* (2d ed. 1976) defines the word "menace" as "threatening," and the word "endanger" as "to expose to harm."

Wisconsin Supreme Court noted that the sewage could affect the health of Milwaukee's citizens and defined the conduct as a public nuisance because of such health hazard. "It is public because of the *danger* to the public." 199 N.W. at 397 (emphasis added).

This prophylactic concept of abating a public health hazard or risk before the disease becomes a reality has been carried forward to statutory tools closely related to common law nuisance. For example, Count II of the complaint in the instant case is based on the Illinois Environmental Protection Act, Ill. Rev. Stat. Ch. 111-1/2, § 1001 *et seq.*

Section 1012 states:

> "No person shall:
>
> (a) Cause or *threaten* to allow the discharge of any contaminants into the environment *in any State so as to cause or tend to cause water pollution in Illinois,* either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act; . . ." (emphasis added).

Section 1003(n) defines water pollution in classic nuisance terms:

> "(n) 'Water pollution' is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life."

Perhaps the most significant development in the law of health hazard prevention is found in the Eighth Circuit decision in *Reserve Mining Co.* v. *Environmental Protection Agency,* 514 F.2d 492 (8th Cir. 1975). There the factual controversy involved the discharge of asbestos-like fibers into Lake Superior. The key controversy was wether asbestos fibers in water were carcinogenic. There was no proof of actual harm caused by ingestion of the fibers. Indeed, there was no quantitative evidence that rates of cancer would increase by drinking Lake Superior water. All that the evidence showed was that there was medical concern regarding the health risk of the asbestos. The court said:

> "In assessing probabilities in this case, it cannot be said that the probability of harm is more likely than not. Moreover, the level of probability does not readily convert into a prediction of consequences. On this record it cannot be forecast that the rates of cancer will increase from drinking Lake Superior water or breathing Silver Bay air. The best that can be said is that the existence of this asbestos contaminant in air and water gives rise to a reasonable medical concern for the public health. The public's exposure to asbestos fibers in air and water creates *some health risk. Such a contaminant should be removed.*
>
> "As we demonstrate in the following sections of the opinion, *the existenceof this risk to the public justifies an injunction decree requiring abatement of the health hazard on reasonable terms as a precautionary and preventive measure to protect the public health.*"
>
> 514 F.2d at 520 (emphasis added)

The Eighth Circuit deliberately stayed away from the uncharted waters of federal common law nuisance in articulating a legal rationale for its action in abating a public health hazard. 514 F.2d at 520. Instead, it relied on a federal statute which allowed abatement of a discharge which was "endangering" the public health.

However, the key significance of its holding was a recognition of the need to protect public health before injury occurred. The court selected from a panoply of legal tools available as a basis for abating public health hazards. The concept of public health "endangerment" remains the same whether found in a statute or in the common law of nuisance. If this Court so desires, it can use the very same concept of threatened harm found in the Illinois Environmental Protection Act or the state common law of nuisance in lieu of declaring substantive doctrines of federal common law.

Reserve Mining also has another facet of interest in this case. Much is made by defendants here of the presence of water treatment plants in Illinois to prevent harm. In *Reserve,* filters were placed in Duluth's water intakes to serve as an interim solution. But water plant filtration was not permitted to justify continued permanent discharges by Reserve. The permanent relief ordered was abatement of the discharge.

B

Related Nuisance Issues

1

Statutory Authorization To Discharge Is Not A Defense To Nuisance

The defendants here have repeatedly relied on their claim that the Wisconsin state water pollution control agency has issued permits to defendants allowing their discharge. The question can be raised as to whether the common law action of nuisance survives in an age of administrative permits created under a statutory scheme of regulation. The answer given by the courts of Wisconsin, Illinois, and numerous other states is that nuisance actions remain a viable tool independent of such regulatory schemes.

A leading case is *Costas* v. *City of Fond du Lac,* 24 Wis. 2d 409, 129 N.W.2d 217 (1964). There, the City of Fond du Lac argued that its compliance with the requirements of the state agency constituted a defense to an action for nuisance. The Wisconsin Supreme Court roundly rejected that claim:

> "Relying on Hasslinger v. Hartland (1940), 234 Wis. 201, 290 N.W. 647, the defendant contends the nuisance was caused by the operation of the plant approved by a state agency and, therefore, was not actionable. In Hasslinger it is observed but not held, 'It may be that if the claim of the adjoining landowner is that the manner of operation is such as to constitute a nuisance, the fact that the plant was built according to specifications of the State Board of Health and is being operated in accordance with their orders and regulations may conclusively establish that there is no nuisance arising out of design or operation of the plant.' This misleading language is *overruled* because of the implication that operation of the sewage disposal plant in accordance with specifications and orders and regulations of the state board of health cannot constitute a nuisance."
>
> 129 N.W.2d at 220 (emphasis added)[13]

See also, State v. *Dairyland Power Cooperative,* 52 Wis. 2d 45, 187 N.W.2d 878 (1971), rejecting a claim that an action to abate a discharge must be based on an agency order. There, the Wisconsin Supreme Court allowed the Attorney General of Wisconsin to pursue a public nuisance action independent of the actions of the state pollution control agency.

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[13] *Costas* also held that a court had the power to direct the kinds of remedial measures necessary to abate the nuisance. 129 N.W.2d at 221-222.

Other states' courts have rendered similar decisions upholding the independent utility of public nuisance actions apart from state regulatory schemes. *See, Commonwealth ex rel. Schumaker* v. *New York and Pa. Co.*, 367 Pa. 40, 79 A.2d 439 (1951); *State ex rel. Shevin* v. *Tampa Electric Co.*, 291 So. 2d 45 (Fla. App. 1974); *People ex rel. Scott* v. *United States Steel Corp.*, 40 Ill. App. 3d 607, 352 N.E.2d 225 (1st Dist. 1976).

2

Balancing Public Health Versus Cost To The Perpetrator

Defendants have made much of the presumed cost of the facilities ordered by the district court. Plaintiffs have already pointed out the lack of foundation for such cost estimates. But even such cost claims must be examined in perspective. Without taking credit for the disproportionate industrial contribution,[14] the defendants' expert Heaps estimated that the average cost per household would run less than $6.00 per month for the total project cost, and that estimate assumes no federal aid for any portion of the project. Gordon Culp, a nationally-known expert on advanced wastewater treatment, estimated a cost of $59 million for the advanced waste water facilities at a total cost of $1.80 per household per month.

Even if the cost burden on the defendant were more severe, the law is clear that the courts will not allow a public health hazard to persist on a claim of economic inconvenience. The most telling example of this principle is found in *People* v. *City of Port Huron*, 305 Mich. 153, 9 N.W.2d 41 (1943). There, the state Stream Control Commission had ordered Port Huron to build a sewage treatment plant. The Michigan Supreme Court affirmed the

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[14] Federal law requires industries to pay costs consistent with their proportionate load on sewage treatment facilities.

necessity for such an order on the basis of the public health hazard reasoning discussed above:

> "The record contains sufficient testimony to substantiate the State's contention that the present raw sewage disposal method is a *constant menace to the health* and well-being of the downriver communities, as well as to tourists."
>
> 9 N.W.2d at 43 (emphasis added)

The trial judge refused to grant injunctive relief under the doctrine of balancing the equities or comparative convenience. The Michigan Supreme Court rejected such a doctrine in cases of public health:

> "Even if we should concur with the trial judge in his conclusion that 'a balancing of equities' favors the city, this is not a proper case for the application of that doctrine. The doctrine of 'comparative injury' should be confined to those situations where the plaintiff can be substantially compensated. . . .
>
> "The doctrine of 'comparative injury' should not be invoked to justify the continuance of an act that tends to impair public health. In Board of Com'rs of County of Ohio v. Elm Grove Mining Co., 122 W.Va. 442, 9 S.E.2d 813, 817, the court said: 'Notwithstanding a business be conducted in the regular manner, yet if in the operation thereof it is shown by facts and circumstances to constitute a nuisance affecting public health "no measure of necessity, usefulness or public benefit will protect it from the unflinching condemnation of the law."
>
> 9 N.W.2d at 43

The court distinguished the Supreme Court's decision in *City of Harrisonville* v. *W. S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 339 (1932), on the fact that the injury to the complainant W. S. Dickey Clay Co. was wholly financial and no public health hazard was involved. As to the principle

that public health nuisances will not be balanced against the defendant's convenience, *see Commonwealth ex rel. Schumaker* v. *New York and Pa. Co., supra* 79 A.2d at 444;[15] *Board of Comm'rs of Ohio County* v. *Elm Grove Mining Co.*, 9 S.E.2d 813, 817 (W. Va. 1940).

The need for Milwaukee to meet the costs of abating its nuisance discharge to Lake Michigan is amply illustrated by the lengthy litigation in *Wisconsin* v. *Illinois*, 289 U.S. 395 (1933). There, to preserve the rights of Wisconsin in the navigability of Lake Michigan, the Metropolitan Sanitary District of Greater Chicago and the State of Illinois were required to spend enormous sums to built huge sewage treatment plant in lieu of diversion of large amounts of water. *See* opinions at 278 U.S. 367 (1929) and 281 U.S. 179 (1930); decree at 281 U.S. 697 (1930). The fiscal convenience of Illinois and the Metropolitan Sanitary District were not balanced into the need to remove the obstruction:

> "It already has been decided that the defendants are doing a wrong to the complainants and that they must stop it. They must find out a way at their peril. We have only to consider what is possible if the State of Illinois devotes all its powers to dealing with an exigency to the magnitude of which it seems not yet to have fully awaked. It can base no defences upon difficulties that it has itself created. If its constitution stands in the way of prompt action it must amend it or yield to an authority that is paramount to the State."
>
> 281 U.S. at 197

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[15] "When the commonwealth so proceeds its right to relief is not restricted by any balancing of equities, nor by the rule of 'damnum absque injuria' as in Pennsylvania Coal Co. v. Sanderson, 1886, 113 Pa. 126, 6 A. 453, nor by any question of possible prescriptive rights for no matter how long continued stream polluters can acquire no prescriptive or property rights to pollute as against the Commonwealth." *Id.*, 79 A.2d at 444.

Three years later the Sanitary District and the State of Illinois were back before the Supreme Court. The defendants had been stalling in the construction of the ordered sewage treatment works and Wisconsin petitioned for enforcement. The Court emphasized the defendant's responsibility to complete the works even in the face of economic difficulties:

> "Despite existing economic difficulties, the State has adequate resources, and we find it impossible to conclude that the State cannot devise appropriate and adequate financial measures to enable it to afford suitable protection to its people to the end that its obligation to its sister States, as adjudged by this Court, shall be properly discharged."
>
> 289 U.S. at 410

Clearly economic burdens—even where they do exist, which is doubtful here—cannot be used as an excuse to avoid abatement of a public health nuisance.

3

Burden of Proof

The Supreme Court's decision in *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), gives no guidance on the burden of proof to be imposed in federal common law nuisance cases tried in the district courts. And the confusing history of previous Supreme Court statements regarding burden of proof leaves the matter further in doubt. A balanced view of the decisions indicates that the Supreme Court has set a higher than normal standard for cases which come before the Court as original actions, but has not imposed specialized standards of proof for normal actions tried initially in the district court.

Judge Grady below believed that the burden of proof was measured by the perponderance of evidence test normally applied in *civil cases* and uniformly applied in state com-

mon law nuisance cases.[16] But to give the defendants the benefit of any doubt he based his decision on the clear and convincing evidence standard urged by defendants. Judge Grady explained his reasoning as follows:

> "The defendants contend that the evidence must be clear and convincing. I am adopting that view for purposes of this case. The second question is: What must the clear and convincing evidence show? The defendants take the view that because the evidence must be clear and convincing, it must show an actual injury. Otherwise, it is not clear and convincing. It is my view and my understanding of the law that what the plaintiffs must show by clear and convincing evidence is the existence of a hazard, whether or not that hazard has in fact eventuated in an injury. The hazard itself is the injury justifying injunctive relief in this kind of case."
>
> (TR. 14229)

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[16] E.g., *Barrett* v. *Mt. Greenwood Cemetery Ass'n*, 159 Ill. 385, 42 N.E. 891, 892 (1896); *Hayes* v. *Village of Dwight*, 49 Ill. App. 530, 534 (2d Dist. 1893); *aff'd* 150 Ill. 273, 37 N.E. 218. *See, Ethyl Corporation* v. *Environmental Protection Agency*, 541 F.2d 1, 28 (D.C. Cir. 1976):

> "Such certainty has never characterized the judicial or the administrative process. It may be that the "beyond a reasonable doubt' standard of criminal law demands 95% certainty. *Cf., McGill* v. *United States*, 121 U.S.App.D.C. 179, 185 n.6, 348 F.2d 791, 797 n.6 (1965). But the standard of ordinary civil litigation, a preponderance of the evidence, demands only 51% certainty. A jury may weight conflicting evidence and certify as adjudicative (although not scientific) fact that which it believe is more likely than not. Since *Reserve Mining* was adjudicated in court, this standard applied to the court's fact-finding. Inherently, such a standard is flexible, it allows the fact-finder to assess risks, to measure probabilities, to make subjective judgments. Nonetheless, the ultimate finding will be treated, at law, as fact and will be affirmed if based on substantial evidence, or, if made by a judge, not clearly erroneous." 541 F.2d 28 n.58.

The question of what the burden of proof should be in federal district court for common law nuisances rests on a number of difficult issues. The Supreme Court has spoken of different standards of proof for nuisance over the years with very possibly different reasons for each standard.

For example, in *Mugler* v. *Kansas,* 123 U.S. 623 (1887), Justice Harlan states the principle that equity will not restrain a nuisance "except upon clear and satisfactory evidence that one exists." 123 U.S. at 673. What Justice Harlan was clearly referring to is the historic equity practice of withholding injunctive relief in cases of conflicting evidence. In such a case, the facts would then typically be tried by a jury and if a finding of nuisance was rendered, equity would then act. As discussed *infra,* such a standard no longer has meaning now that law and equity have merged and the trial judge who sits as chancellor also sits as trier of fact to resolve conflicting factual questions.

After *Mugler,* the Supreme Court's next articulated an evidentiary standard in the first *Missouri* v. *Illinois* decision, 180 U.S. 208 (1901), emphasizing the need for "determinate and satisfactory evidence" to sustain injunctive relief. 180 U.S. at 248. Here again, the standard is lifted straight from historical limitations on equity practice rather than a standard of proof for the determination and abatement of a nuisance. As discussed above, at common law a public nuisance was abated by indictment, conviction by a jury, and an order of abatement.[17] Courts of equity sitting without a jury gave relief for public nuisances only under unusual circumstances where the usual remedy of abatement at law by indictment was too slow to prevent emergency hazards.

Where an action and trial at law was too slow to prevent impending harm, courts of equity could intervene to pro-

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[17] III Blackstone *220. Similarly, historic abatement of private nuisance was by action at law rather than equity.

hibit a threatened nuisance. It was to be exercised in those cases where " there was imminent danger of irreparable mischief *before* the tardiness of the law could reach it." *City of Georgetown* v. *The Alexandria Canal Company,* 37 U.S. 91, 98 (1838) (emphasis added). The basic rule was that a court of equity had no jurisdiction over crimes, and public nuisances were normally prosecuted as crimes. *State* v. *Uhrig,* 14 Mo. App. 413, 415 (1883).

The reluctance of equity to intervene was primarily predicated on the fact that the chancellor sat without a jury. Actions in equity of necessity deprived the defendant of a trial by jury on the factual basis of the claimed nuisance. 14 Mo. App. at 415, 416. Thus, equity would intervene only in rare cases and only then where the evidence was "determinate and satisfactory." 2 *Story's Equity Jurisprudence* §§ 1251, 1252 (14th ed. 1918). Where evidence as to the injury to the public was conflicting or doubtful, equity would not intervene but would leave the issue of fact to trial by jury.

> "But the question of nuisance or not must, in cases of doubt, *be tried by a jury,* and the injunction will be granted or not as the fact is decided."
>
> *Id.,* § 1250

> ". . . If the legal right is doubtful the practice appears to be to leave that question to trial at law."
>
> *Id.,* § 1250 n.4

Today the conceptual gulf between the fact-finding functions at law and the need for the chancellor to await a trial on the facts at law have little meaning. Equity and law have been merged in the federal courts. Absent a jury demand, the trial judge performs the fact-finding functions of a jury as well as the role of the chancellor. Consequently, it is the trial judge who now performs the function of resolving conflicting factual issues and the historical standard for such resolution in civil cases has been the pre-

ponderance of the evidence. Therefore this Court should follow the same standard of proof followed by law juries to determine liability in controverted fact situations (i.e. preponderance of the evidence) and then apply equitable remedies.

The Supreme Court's next statement as to evidentiary standards comes in the second *Missouri* v. *Illinois* decision, 200 U.S. 496 (1906):

> "Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side."
>
> 200 U.S. at 521

It is not clear whether Justice Holmes was referring to proof required in original actions in the Supreme Court [18] or actions between states,[19] or indeed whether he was referring to any special burden of proof at all. Indeed, in *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907), after his opinion in *Missouri* v. *Illinois*, Justice Holmes stated that the State of Georgia proved its case "by a preponderance of the evidence" and that such preponder-

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[18] "Before *this* court ought to intervene," 200 U.S. at 521 (emphasis added).

[19] Justice Holmes was clearly concerned about "interference by *this* court with the action of a State." 200 U.S. 521. But see *Ohio* v. *Wyandotte Chemical Co.*, 401 U.S. 493, 501 n.5 (1971). In an opinion emphasizing the Court's reluctance to have original actions intrude upon the Supreme Court's appellate docket, Justice Harlan indicated that the Ohio action on *state* common law nuisance aginst private parties would be subject to an "unusually high standard of proof" if the Ohio action were brought originally in the Supreme Court. The Harlan opinion suggests that the higher standard of proof is a docket control mechanism for the Supreme Court rather than any special burden based on the substantive cause of action.

ance of evidence met the requirements of *Missouri* v. *Illinois*. 206 U.S. at 238.

The next case where any specialized evidentiary requirement was discussed is *New York* v. *New Jersey*, 256 U.S. 296 (1921). There, the Court, in paraphrasing Justice Holmes' statement in *Missouri* v. *Illinois*, used the "clear and convicing evidence" phrase:

> "Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence. *Missouri* v. *Illinois*, 200 U.S. 496."
>
> 256 U.S. at 309.

Again, like Holmes' opinion in *Missouri* v. *Illinois*, the Court seemed to emphasize a limit on the exercise of extraordinary jurisdiction of the Supreme Court, rather than a standard of proof to be used in civil cases at the district court level. Such an interpretation is given added support by the Court's later decision in *Ohio* v. *Wyandotte Chemical Corp.*, *supra*, that a state action against a private individual—which could be based on state common law nuisance in the state courts of Ohio—would be subject to this "unusually high standard of proof" as an original action in the Supreme Court.

An additional factor may have influenced the Court in both *Missouri* v. *Illinois* and *New York* v. *New Jersey*. In both those cases the complaining state was discharging sewage of the same or worse quality than the defendant state into the very waters sought to be protected. Missouri allowed sewage discharges into the Mississippi upstream of the St. Louis water intake. Defendants admitted that the water supply of St. Louis represented a health hazard,

but contended that the nuisance was caused by Missouri's own cities:

> "That the water supply of St. Louis is polluted and infected defendants do not deny; but they assert that the infected material bringing about this condition is derived, not from Chicago, but from towns, villages and rural communities much nearer, in point of time, to the St. Louis intake at the Chain of Rocks."
>
> 200 U.S. at 511.

> "The evidence in this case establishes the fact conclusively that the sewage discharged into the Missouri and the Mississippi Rivers by the cities situated within the jurisdiction of complainant is sufficient of itself to contaminate and infect the water supply from the Missouri and Mississippi Rivers, exclusive of all other sources of contamination or pollution entering said stream."
>
> *Id.*, at 512-13.

These facts clearly influenced the Court:

> "Where, as here, the plaintiff has sovereign powers and deliberately permits discharges similar to those of which it complains, it not only offers a standard to which the defendant has the right to appeal, but, as some of those discharges are above the intake of St. Louis, it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it that courts should not be curious to apportion the blame."
>
> *Id.* 200 U.S. at 522

Similarly, in *New York* v. *New Jersey, supra,* the Court emphasized that the City of New York, within the com-

plainant State of New York, discharged into the same waters

> ". . . more than seven times as great a volume of sewage (entirely untreated) as the daily discharge of the proposed sewer would be for many years to come."
>
> 256 U.S. at 303

In summary, the Supreme Court may legitimately be concerned about conservation of its appellate resources by discouraging original actions with a specialized standard of proof. However, nothing in the Court's past actions suggests a desire to penalize public officials seeking to protect the public health at the trial court level. To extend such burden to a *de novo* civil action in a trial court would have ominous effects on protection against public health hazards. Plaintiff State of Illinois respectfully suggests that the traditional civil standard of preponderence of the evidence be declared by the Court as the burden of proof for this and future public nuisance actions.

II

JUDGE GRADY'S FINDINGS AND RECORD REFERENCES TO SUPPORT SUCH FINDINGS

As stated above, Judge Grady found that defendants' raw and inadequately treated sewage discharges create two separate public nuisances:

1. The creation of a health hazard in Illinois waters by reason of the transport of viral and bacterial pathogens.

> "I find from what I regard as clear and convincing evidence that the discharge of sewage by the defendants into Lake Michigan constitutes a health hazard of serious magnitude to the residents of the State of

Illinois and that, unless enjoined by this court, that danger will continue to exist." (A. 41)[20]

2. The substantial contribution by defendants to the accelerated eutrophication of Lake Michigan with resultant harm to the aesthetic beauty of Lake Michigan and resultant adverse effects on the quality of Lake Michigan as a source of potable water (taste and odor problems).

> "I find from what I believe is clear and convincing evidence that the defendants' sewage discharges into Lake Michigan are presently contributing in a substantial way to the accelerated eutrophication of the in-shore zone of the western shore of Lake Michigan, including waters of Lake Michigan which are within the territorial boundaries of the State of Illinois.
>
> "I find further, on the basis of clear and convincing evidence, that due to the interchange of waters in the in-shore and off-shore zones, the defendants' discharges, if continued at anything like present levels, will substantially contribute to the accelerated eutrophication of Lake Michigan as a whole, including waters within the territorial boundaries of the States of Illinois and Michigan." (A. 55-56)

Both of these nuisances—the public health hazard and the problem of eutrophication—fall within the classic common law definitions of public nuisance: an interference with the rights of the community at large.

Judge Grady announced these findings of ultimate fact after setting forth a logical chain of intermediate findings

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[20] The entire transcript of Judge Grady's oral Findings of Fact and Conclusions of Law are contained at pp. 20-67 of defendants-appellants' appendix. References in this memorandum are to the appendix.

of fact based on the evidence at trial. His findings are organized into two areas: public health and eutrophication. This memorandum will track the organization of these findings as set forth in the transcript. Plaintiffs have neither the time nor the space to list all of the evidence to support such findings of fact but will be as comprehensive as possible.

A

Public Health

"The case breaks down into two principal subject matter areas. The first is the matter of public health, and I will address myself to that now." (A. 27)

Finding By The Court: Defendants' Discharges:

"The defendants in this case discharge disease-causing bacteria and viruses to Lake Michigan in two ways. First is the raw sewage which is discharged to Lake Michigan during wet weather periods through devices known as overflows, by-passes and cross-overs from the sanitary sewer system to the storm sewer system."

(A. 27)

Dr. Joseph Melnick testified:

Q. Directing your attention to the city or the metropolitan area of Milwaukee, Wisconsin, will the raw sewage of the City of Milwaukee, Wisconsin or the metropolitan area of Milwaukee, Wisconsin contain enteroviruses?

A. Yes.

Q. How do you know that?

A. Because every city the size of Milwaukee will have carriers of enteroviruses living in the city who will be excreting viruses into the sewage. (Dr. Melnick, TR. 2206)

As to the quantity of virus in raw sewage, defendants' witness Cliver testified:

> Q. To the extent that we have in [sic] infected person within a city, a single person, isn't it correct that a single gram—can you tell the Court for the record what a gram is in terms of relationship to pounds?
>
> A. It is 154th of a pound.
>
> Q. All right, 154th of a pound of feces, human feces, of an infected individual would contain or could contain literally millions of enteric viruses?
>
> A. Yes. (Cliver, TR 10278)[21]

Viruses contained within a quart of sewage range from 7,000 to several hundred thousand infectious units. Dr. Melnick testified:

> Q. Has a standard number of a number been used in the profession as to the typical concentration of plaque form units per liter of sewage, raw sewage?
>
> A. I believe that people at EPA in Cincinnati have used an average of about 7000 infectious units.
>
> Q. So this is 7000 colonies or 7000 plaque form units per liter?
>
> A. 7000 infectious virus particles. I think that is what you ought to call them.
>
> Q. When you say 7000 infectious virus particles, is that synonymous with 7000 plaque form units?
>
> A. That's right.
>
> THE COURT: Per milliliter?
>
> THE WITNESS: No. This is per liter. This is another way of saying it would be enough to infect 7000 people.

---

[21] One gram is actually 1/454 pounds.

By Mr. Karaganis: Q. With respect to a liter, in terms of gallons, of course, how much is a liter approximately?

A. A little over a quart.

Q. With respect to this 7000 number, is that as high as plaque form units per liter go in raw sewage?

A. No, we have had samples that we tested that go into the hundreds of thousands.

Q. With respect to that——

A. 7000 is a modest figure. I use it because EPA uses it. We could have a figure of 10,000, 1,000. It is in the thousands.

Q. When you say several hundred thousand, could that occur in the typical urban population under a variety of conditions?

A. Yes. (Dr. Melnick, TR. 2184-2186)

Plaintiffs' witness Geldreich testified:

Q. What is a bacterial pathogen?

A. It is any organism that can produce disease.

Q. Is there a difference between bacteria and viruses?

A. Yes.

Q. What is a bacteria, or a bacterium, for the singular?

A. A bacterium is a much larger organism than a virus, but still is microscopic in size. We are talking quite often in two to seven microns, submicroscopic sizes on some of them, while others are quite large. But in general that would be the size of them. They are more defined than a virus, in that they have a cell which is very easily distinguished.

Q. When I use the term pathogen, what does that mean?

A. A pathogen, in my mind, is any organism that can produce disease.

Q. How many different kinds of bacterial pathogens are there?

A. The number of bacterial pathogens, the total number, is really not known, but if we were to relate only to those which we find commonly in polluted water, salmonella has 400 serotypes, and shigella has 600 serotypes. So already we are talking over a thousand potential pathogens from just two of the known pathogens that are in water. (Geldreich, TR. 3052-3053)

Viruses and bacteria cause disease in humans.

Q. Would it be fair to say the enteric viruses are viruses found in the gut?

A. Right. (Dr. Melnick, TR. 2149)

Enteric viruses are shed through the feces, and fecal transmission is an essential link in infection.

Q. Would it be fair to say that somewhere in the chain of transmission there has to be feces involved?

A. Yes. That is what we mean by fecal-oral transmission. (Dr. Melnick, TR. 2155)

Viral infection and disease are not the same, and a healthy person who becomes infected will also become a transmitter of viral disease without showing the symptoms.

With many enteroviruses, for each person who becomes ill, there may be as many as 100 who never become ill.

However, the first phase of infection is exactly the same as in a person who is going to become sick. The

only thing that is different is that this person who becomes a carrier continues to excrete virus from the feces for long periods of time, and the amount of virus put out in the feces can be very, very high indeed. Yet, there is no way of knowing that such a child or adult is a carrier unless virus assays are done on such a person. (Dr. Melnick, TR. 2145)

The diseases caused by enteric virus:

Myocarditis

Q. You mentioned myocarditis. Can that be caused by one of the Coxsackie viruses?

A. Yes. Coxsackie B particularly. There are a number of Coxsackie B viruses which have as their target organ the muscle tissue.

Q. Muscle tissue?

A. The muscle tissue of the heart.

Q. With respect to the muscle tissue of the heart, what symptoms are shown? Is the one you said affects infants or young children?

A. Yes.

Q. What does it do?

A. It produces inflammation of the heart, so that the heart is unable to pump blood the way it normally should. You have a deficient pump.

Q. As an organism or as a virus like Coxsackie virus that has an affinity toward the heart tissue, as affixes to the cell tissue in the heart muscle, is that destroying cell tissue?

A. Yes. (Dr. Melnick, TR. 2165-2166)

Pleurodynia

Q. You mentioned pleurodynia. Is pleurodynia a symptom, caused by a Coxsackie virus?

A. Yes. It is the disease of the chest. It is a disease of the covering of the lungs, the lining of the chest that covers the lungs.

THE COURT: Excuse me. Which one is that?

THE WITNESS: Pleurodynia.

BY MR. KARAGANIS:

Q. Go ahead.

A. When the lining becomes infected with the virus, there is a great deal of inflammation and pain in the chest. So the patient has discomfort in breathing, and he may be ill for a period of several weeks to a month before this clears. (Dr. Melnick, TR. 2164-2165)

Birth Defects

Q. Do Coxsackie viruses contribute in any way to any prenatal or birth defects?

A. Yes. This is an area that deserves more study than it has been given. But Dr. Brown at the University of Michigan did a very thorough study, in which he followed thousands of women through pregnancy, and for their infection with Coxsackie viruses, and then correlated this with whether or not they had any malformations in the children who are born to them.

Women who are infected with Coxsackie, again the B viruses, during pregnancy had a much higher rate of malformed children than the women who were not so infected. (Dr. Melnick, TR. 2167)

Pericarditis

Q. With respect to Coxsackie viruses, is there a disease symptom involved with one of the strains of Coxsackie called pericarditis?

A. Yes.

Q. What is that?

A. It is an infection of the lining of the heart.

Q. When we have talked about Coxsackie A and Coxsackie B, we have been talking about enteroviruses, have we not?

A. That's right.

Q. And these are the viruses that 99.9 percent of the time must travel through the fecal route, is that correct?

A. That's right. (Dr. Melnick, TR. 2167)

Hepatitis

Q. With respect to the types of hepatitis, which type of hepatitis is the entero type—

A. Type A.

Q. And what disease symptoms does hepatitis type A cause? What organ does it attack?

A. It attacks the liver. (Dr. Melnick, TR. 2168)

Bacteria produce less severe but still debilitating illnesses.

Q. With respect to salmonella, what kinds of disease can salmonella, the various strains of salmonella, cause?

A. Quite often we are talking about a diarrhea or a food poisoning type condition, which more or less is

related to regurgitating the stomach contents. These things produce also fevers. They can be a problem with the patient for a minimum of a few hours to two days or weeks, depending upon which of the strains you are speaking of.

Q. With respect to shigella, which is spelled s-h-i-g-e-l-l-a—is that right?

A. Yes.

Q. What kind of disease symptoms or illnesses does shigella cause?

A. Similar to those of salmonella. Basically we are looking at organisms that cause an intense diarrhea. (Geldreich, TR. 3053-3054)

Defendants' employees have acknowledged the problem in describing Milwaukee's sewage discharge.

All in all, it is apparent that pollution of the surface waters from human sources is tremendous. Defendants' Draft Facilities Plan (Plaintiffs Exhibit 35, p. 12)

Failure to implement a solution to the problem will cause the continuation of sanitary sewage-related health hazards resulting from the introduction of untreated or inadequately treated sanitary sewage to the surface waters, . . . (*Id.* at 279)

The disease-causing bacteria and viruses discussed above are discharged to Lake Michigan by two methods:

First in the form of raw sewage which is discharged to Lake Michigan during wet weather periods through devices known as overflows, by-passes, and cross-overs from the sanitary sewer system to the storm sewer system. (A. 27)

Defendants' employee Wieland testified:

Q. Would it be fair to characterize a sewage treatment system in two parts, namely (a) the collector system and (b) the treatment works?

A. That could be one characterization, yes. (Wieland, TR 117)

Q. In terms of sanitary sewage coming from a residence, is it correct to say that the sanitary sewage is deposited in a lateral sewer and then, from a lateral sewer, goes to a local collector?

A. Yes.

Q. Is it not also true that the local collection system or local collector sewers in the Milwaukee area then connect up with the interceptor sewers operated by the City Commission?

A. Yes. (Wieland, TR. 118)

Q. As far as the interceptor system that picked the sewage from municipal collectors in the City of Milwaukee or in the Metropolitan Sewerage District, is that system of interceptors referred to as the MIS or Main Interceptor System?

A. Yes. (Wieland, TR. 120)

Q. Mr. Wieland, on Plaintiff's Exhibit 51 you have shown green and yellow circles with numbers on them. Would you state what those green and yellow circles represent?

A. The green and yellow circles represent overflow points.

Q. Are those all of the overflow points within the metropolitan interceptor system?

A. No.

Q. What other overflow points are there?

A. There are other overflow points on the local systems.

Q. I am not talking about the overflow points on the metropolitan interceptor system.

A. To the best of our knowledge, that is all there are.

Q. Approximately how many are there?

A. I think there is about 50. I am not sure.

Q. When you describe an overflow point or when you use the term "overflow point," would you describe to the Court what you mean by an overflow point?

A. There are different types, first of all. Some of those that are indicated on the map are what we call relief pumping stations. These pumping stations are installations of pumps that are activated by electrodes so that when the water level in a sewer system gets to a certain point—and this point is usually determined by the critical areas in the service area—the pumps will automatically start operating and discharge the flow into a storm sewer or directly to a water course.

Q. When you say discharge the flow, you are talking about the sewage flow, are you not?

A. Yes.

Q. How many electric pump stations do you have of the approximately 50 overflow points?

A. I think we have 10.

Q. Then what are the remainder of the overflow points? What kind of overflows are those?

A. The others are what we call gravity overflows. When the sewage reaches a certain level in the intercepting sewer system, it reaches a bypass pipe, an

overflow pipe, and runs off into, again, either a storm sewer or the surface waters. (Wieland, TR. 133-35)

Q. So Jones Island is also an overflow point, is it not, where raw sewage is bypassed?

A. There is an overflow at Jones Island, yes.

Q. Isn't it true that raw sewage is bypassed at Jones Island?

A. Yes.

Q. Mr. Wieland, have you or the Commission——

THE COURT: We are using the present tense here, and so there will be no ambiguity later on as to what this witness did say, is your testimony descriptive of the existing situation today, Mr. Wieland, as well as what existed back in 1960?

THE WITNESS: Yes. (Wieland, TR. 135).

Q. Mr. Wieland, what causes an overflow? Why does raw sewage overflow instead of going into the pipe and traveling through to the sewage treatment plant? Why does it overflow?

A. An overflow can be caused by a blockage in the sewer line. It can be caused by more flow in the pipe than the pipe can handle.

Q. Isn't it a fact that most, if not all, of the overflows contained on Plaintiffs' Exhibit Number 52 and Plaintiffs' Exhibit Number 51 operate because of hydraulic overloads in the pipe?

A. Yes.

Q. What causes hydraulic overloads in a pipe?

A. More liquid coming into the pipe than the pipe can handle.

Q. Can that overload be caused by more sanitary sewage coming into the pipe than the pipe can handle?

A. Yes.

Q. Isn't it correct that in the development of the Metropolitan Interceptor System, pipes of a larger capacity were connected to pipes downstream which had a lesser capacity?

A. Yes.

Q. Mr. Wieland, is it correct that the Sewage Commissions have plans to build additional sewers for additional flows that will be carried to South Shore and Jones Island?

A. Yes.

Q. Those flows will be on the flows already carried there, isn't that correct?

A. Yes. (Wieland, TR. 139-140)

Q. The overflow conditions that occur, the overflowing of raw sewage into the lake and in the streams leading into the lake, that is often referred to as wet weather phenomon, [sic] isn't that right, wet weather occurrences?

A. Yes.

Q. Isn't it a fact that the MIS system becomes so surcharged under rainfall that these overflows can keep flowing and keep discharging raw sewage for up to 30 days after the rainfall stops?

* * *

BY THE WITNESS:

A. I think there have been occasions when a particular overflow may have continued for a period after a rainfall or runoff event and, of course, whether it can go

30 days or not depends upon the ground conditions at the time of the rainfall and the length of the rainfall.

BY MR. KARAGANIS:

Q. You yourself know of surcharges and overflows that have gone on for up to 30 days, isn't that right?

A. No, I said it was possible in my deposition.

Q. So the record is clear, did I ask you these questions and did you give me these answers at your deposition on December 27, 1976?

MR. MOERKE: What page, please?

MR. KARAGANIS: Page 207.

BY MR. KARAGANIS:

Q. "Q. Is it your position or statement then that as the MIS overflows, there is no overflowing and conditions where precipitation has not occurred?

A. No, I won't say that because sometimes the overflow takes place after the—continues to take place after the precipitation has stopped.

"Q. How long?

A. It depends upon the sewer system. It depends upon the intensity of the rainfall.

Q. All right. What range of consistency have you noticed in terms of continuing after the——

A. There is no consistency. On some systems it can go for 30 days.

Q. You could have surcharges and overflows for 30 days?

A. You can. You can.

Did I ask you these questions and did you give me these answers?

A. Yes, sir. (Wieland, TR. 353-355)

In addition to the 50 overflows on the Main Interceptor System (MIS) there are 112 overflow points where the City of Milwaukee collector system in the central portion of Milwaukee connects to the MIS. The location of these 112 "CSO" overflows is shown on Plaintiffs' Exhibit 53A. Moreover the City of Milwaukee maintains 78 additional overflow devices called "cross-overs." Defendant's employee Laszewski testified:

Q. With respect to the crossovers and approximately how many sanitary crossovers do you have?

A. In the separate sewered area approximately 78, including the pumps. (Laszewski, TR. 448)

The stench from these sewage overflows gets so foul that in periods of low flow the defendants actually "flush" the contaminated sewage out into Lake Michigan by means of giant flushing tunnels.

Until the intercepting sewage system and wastewater treatment plant was constructed, the City of Milwaukee was entirely dependant on the operation of this installation to replace the foul smelling, cesspool like characteristics of the Kinnickinnic River between the pumping station and the harbor entrance with clear lake water by flushing all sanitary and industrial sewage out into Lake Michigan. After the completion of the intercepting sewerage system and treatment plant, its operation and necessity has decreased somewhat. However, it is still in use to cleanse the river during periods of low flow wherein objectionable pollutional materials, *including sewage discharged into the river* during storm rainfall periods, *are flushed into Lake*

Michigan to prevent an objectionable and odoriferous build-up in the river. Plaintiff's Exhibit 162 (emphasis added).

Finding By The Court: Discharge Standards:

"The second way in which these pathogens are discharged to the lake is in the form of insufficiently treated sewage effluent discharged from the two sewage treatment plants owned and operated by the defendants.

"The pathogens are in the effluent for several reasons. One reason is that the treatment time is often insufficient, due to overloading of the plants, and there is not sufficient time to settle out the solids in the sewage.

"These solids interfere with chlorination, so that the chlorine does not reach the pathogens. Even when the plant is not overloaded many of the solids still fail to settle out.

"The defendants attempt to conform their effluent to a standard of 30 parts per million of suspended solids and BOD, but they rarely achieve that standard and concede that before they can meet it with any consistency a substantial amount of additional plant renovation and updating will have to be done; but even if a 30/30 standard were met, it is my finding that the standard would still result in the discharge of staggering numbers of pathogens to Lake Michigan." (A. 27-28)

The operating records of Defendants' South Shore and Jones Island Treatment Plants are contained in Plaintiffs' Exhibits 92, 93, 94, 95, 112, 123 and 125 and Defendants' Exhibits 1202, 1203, 1205, 1206 and 1207.

The performance of these plants is extremely poor. Plant performance is normally measured by two basic parame-

ters—Suspended Solids and Biochemical Oxygen Demand ("BOD" is an indication of organic material). An analysis of plant records shows that on many days the plants remove little if any of the incoming sewage. Indeed on some days because of poor operation more sewage solids are discharged to Lake Michigan than come into the plant. As discussed below solids and BOD removal are the key to effective chlorination.

Dr. Flora Mae Wellings of the State of Florida Department of Health and Rehabilitative Services has performed literally thousands of virus tests on raw sewage and treated sewage from secondary treatment plants.

> Q. Would it be fair to say then that both with respect to raw sewage and effluents from secondary treatment and activated sludge plants that your samples run into the thousands?
>
> A. Yes. I know they did. (Dr. Wellings, TR. 12293)

Plaintiffs learned of Dr. Wellings from a memorandum written by Mr. Ernest, Defendants' plant manager at Jones Island. In a memo written prior to trial Mr. Ernest states:

> In discussing the question of viruses with Dr. Wellings, it was evident that she was indeed an authority on sewage and water borne viruses. (Memo from Ernest to Borchardt, April 9, 1975.)

Dr. Wellings further testified:

> Q. With respect to that, based on your experience with the activated sludge plants in St. Petersburg, what levels of removal have you seen with respect to an operating activated sludge plant?

* * *

BY THE WITNESS:

A. The results varied tremendously. It depends on the operation of the plant. It depends on the load coming into the plant. If the plant is overloaded, we had coming out what went in.

BY MR. KARAGANIS:

Q. In other words, zero removal?

A. Zero removal. (Dr. Wellings, TR. 12,377-78)

Q. Doctor, have you made inquiry and investigation as to any other operating parameter of plant performance that is related to either low virus removal or high virus removal?

A. The solids is the key to operation.

Q. Would you explain? Is that because the viruses are associated with solids?

A. That's right. (Dr. Wellings, TR. 12,378)

BY MR. KARAGANIS:

Q. Doctor, have I asked you to examine the operational records of the South Shore and Jones Island Plants?

A. Yes. (Dr. Wellings, TR. 12,387)

Let's take 424 out of the sewage coming in. .777 in the final effluent—in the primary effluent, 199 in the final effluent.

BY MR. KARAGANIS:

Q. Do you anticipate much viral movement [sic] under those conditions?

A. You are still going to have a lot of virus coming through even at 199.

Q. With respect to that, the solids coming through, when you have got that, those solids, will they get effective chlorination?

A. No, no, no.

Our aim in St. Petersburg is to reduce solids to a 5, Jackson, JTD, Jackson Turbidity units, which is less than, I think probably 5 milligrams per liter of solids.

Then that gives you the opportunity to have an effective chlorination. (Dr. Wellings, TR. 12,396)

THE COURT: If you have say 5 milligrams per liter of solids, does that help the chlorine remove or kill the viruses associated with those solids more than would be the case if say you had 30 milligrams per liter?

THE WITNESS: Well, the problem with 30 milligrams per liter is you are going to have a lot of organics tied up with solids that is going to use up your chlorine, and the chlorine can't even get into.

THE COURT: I see. So the fewer solids, the less chlorine is used up in other ways?

THE WITNESS: That is right, and that is the reason if you get it down low enough you will have enough active chlorine that can really get to the solids. (Dr. Wellings, TR. 12,398)

Q. Doctor, whenever we are finding high solids well, is it your opinion that even at 30 milligrams per liter of solids that we have a problem with disinfection?

A. I think you would still have a problem with disinfection.

I really don't know how I would equate Jackson Turbidity Units with milligrams, you know, because you would have to know size, shape, and all that, source, because of the test itself; but I would say 5 milligrams per liter would be well in the ball park.

* * *

THE COURT: What do you mean by that phrase? Do you mean that would be what you would desire?

A. Well, I wouldn't want anymore than that.

THE COURT: You would not want anymore than that.

THE WITNESS: I would prefer much less, but I wouldn't want anymore than 5.

BY MR. KARAGANIS:

Q. So if we could perform at a maximum of 5 but consistently there would be ones and twos, would that be it?

A. Yes. (Dr. Wellings, TR. 12,401-02)

Dr. Wellings' court testimony is given added credibility by Ernest's 1975 memorandum where—before Plaintiffs' even knew of her existence—Wellings gave Ernest the same information.

> Dr. Wellings stressed the problems of virus destruction in the presence of solids and indicated that some recent work done in her laboratories indicates that *virus destruction with chlorine in the presence of solids is virtually impossible* from a practical scale. Plaintiff's Exhibit 117 (emphasis added)

The problem of solids shielding the pathogenic organisms and organic materials binding up the chlorine was addressed by numerous other experts.

Dr. Berg—the top EPA expert on viruses in sewage testified:

Q. Now, if there are organic materials present in the water, will that affect or interfere with the disinfectant capability of chlorine?

A. That is right. There are nitrogenous materials, nitrogenous organic materials that are present in

water that will also react with chlorine or with these chloramines and form other chlorine compounds which are much slower virucides or bacteriocides or perhaps are not bacteriocidal or virucidal at all.

Q. So, depending, if they mix up with organics in water, they can be either a slower acting virucide or bacteriocide, or they can be ineffective at all?

A. That is correct.

Q. Now, by the way, when you mix up chlorine with these compounds or particularly with ammonia, what is that called?

MR. KARAGANIS: Strike that.

BY MR. KARAGANIS:

Q. If you are measuring the chlorine in the water after it is mixed up with either ammonia or some of these other materials, what is that called?

A. The chloramines, do you mean?

Q. Yes. What does that measure when you are talking about measuring the chlorine residual?

A. Combined chlorine. We generally refer to this as combined chlorine.

Q. When we measure the amount of chlorine that is left in the water, that is known as the combined chlorine residual under those circumstances?

A. Yes. (Dr. Berg, TR. 12,065-66)

Q. Now, Doctor, with respect to chlorine and its virucidal capability, let's assume it is even a free chlorine, will viruses that are encased in solids be destroyed by free chlorine?

A. Not if the chlorine can't reach them.

Q. So, if we have got fecal material or any other materials surrounding the viruses and you put chlorine on it, will that kill it?

A. The chlorine isn't going to penetrate very far. It is not going to kill embedded virus.

Q. Would it be fair to say that an order to have effective chlorination of the material that you are chlorinating, you should remove the solids?

A. That is correct.

Q. With respect to the organics, do you also try and remove the organics?

A. Yes. You would want to do that in order to prevent or reduce the formation of the compounds that are less effective. (Berg, TR. 12066-67)

Edwin Geldreich, a top EPA expert on bacteria in sewage testified:

Q. What if anything interfers [sic] with effective chlorination?

A. Nutrients, which have a demand for chlorine as one of the major problems. Turbidity, which allows the organisms to be bound so that they may pass right through the exposure of chlorine and still survive in a micropellet or in some clump or particle.

Q. By bound, you mean encased within the solid material?

A. Encased, yes.

Q. When you said nutrient material, is another term for nutrient BOD?

A. Yes. We are talking about nutrients. In this case mostly in terms of organics which combine very readily

with the chlorine to form a variety of compounds, many of which have no input into the disinfection action of the chlorine.

Q. You say many of which have no input. Does that mean they are not good disinfectants?

A. That is correct. (Geldreich, TR. 3083-3084)

A key reason for the poor performance of defendants' plants is the inherent variability in the ability of sewage particles to settle. Defendants' plants rely on gravity settling basins to collect the sewage particles prior to discharge. But variations in the sewage particles and hydraulic flow inhibit settling. Instead of settling, much of the solid sewage goes out into Lake Michigan.

Gordon Culp, a nationally known sewage engineer who is a top consultant to EPA, reviewed Milwaukee's operation and testified:

A. I think as evidenced by operating records from the plant of Milwaukee and many other plants that we have looked at, you get variations in the settling characteristics of the biologic floc that make up the activated sludge, and your last chance to retain those before they escape into the receiving body of water is a gravity separation device, which is the clarifier. If, in fact, they don't settle within that basin, a secondary plant, they are lost to the stream.

Q. Or the lake?

A. Or to the lake, yes. (Culp, TR. 13010)

After describing what defendants discharge from their overflows and treatment plants Judge Grady turned to the transport of the pollutants from Milwaukee to Illinois waters.

Finding By The Court: Transport:

> "These pathogens, once they are discharged to the lake, are on occasion transported by the currents to the waters of the State of Illinois. We know this for several reasons. First of all, both sides concede that on a number of occasions throughout the year, there are currents of sufficient persistence in a southerly direction and of a sufficient speed to transport from the Milwaukee area pathogens which will still be alive when they reach the Illinois state line." (A. 28)

Plaintiffs' witness Captain James Verber of the United States Public Health Service testified as to transport based on his own studies in Lake Michigan performed for the special master in the lake diversion litigation (Lake Currents Plaintiffs' Exhibit 142) and a currents study performed by the University of Wisconsin at Milwaukee by Sato and Mortimer entitled *Lake Currents and Temperatures Near the Western Shore of Lake Michigan* (Plaintiffs' Exhibit 38).

> Q. With respect to the distance from the harbor of the City of Milwaukee to the Illinois state line, are you familiar with the approximate distance, recognizing that the Milwaukee Metropolitan area has variable distances, but speaking of the center of the harbor?
>
> A. Approximately 37 miles to the Illinois line.
>
> Q. Given that distance, have you examined the Sato and Mortimer work and reviewed your own work to determine whether or not there were times in which the movements from the Milwaukee Metropolitan area would have sufficient speed and sufficient duration to reach the Illinois line?
>
> A. Yes. I reviewed some of my early work, which involved 6 hour averages, and I found six specific instances during the period I reviewed, particularly from

station 17, of the data I had on hand, in which persistency occurred from 180 hours at low speed—this in the vicinity of 10 centimeters per second—which was sufficient to carry the water transport in a parcel of water 50 miles in a southerly direction.

Other instances of the other five that I reviewed began at 118 hours and as low as 60 hours, all of which were in excess of 40 miles in these time periods.

Q. When you say in excess of 40 miles, you mean in excess of 40 miles in the total hours?

A. That's correct.

Q. When you say 60 hours, is that two and a half days?

A. That is two and a half days. During a storm period we found one instance of a day and three-quarters, where it would have been approximately 40 miles travelled.

Q. Within a day and three-quarters? (Verber, TR. 2379-80)

Q. Do you have an opinion as to whether waters from the vicinity of the metropolitan area of the City of Milwaukee move into Illinois waters?

A. Yes, as I indicated in my deposition, I estimated that approximately 12 times a year waters would flow from the Milwaukee area as far south as Illinois.

The Mortimer-Sato work indicates that there are years in which this could be greatly exceeded.

Q. The 12 times could be greatly exceeded?

A. The 12 times, yes.

Q. Is the 12 times an average or typical figure?

A. I would consider it more like a typical figure.

Q. Under different years and under different conditions, it could be higher or lower, is that right?

A. That is correct. (Verber, TR. 2392)

Dr. Gabriel Csanady, of Woods Hole Oceanographic Institute, who has studied coastal currents on all the Great Lakes, summarized the phenomenon of coastal transport of pollutants in Lake Michigan as follows:

> [W]ithin the coastal zone, of about 10 km width, currents are generally shore-parallel and persist in one direction or the other for a period on the order of weather cycles, typically 100 hours. On the rise of a stronger wind opposing an established current, the latter reverses direction within a few hours. As a result, parcels of water travel up and down along a coast, their total excursion one way being on the order of the typical current velocity, 30 cm/sec, times the typical weather cycle period of 100 hrs, i.e. up to 100 km. Because water parcels also carry whatever pollutant is injected into them by a nearshore source, what we might call the influence zone of such a source extends a distance of the order of 100 km along the shore in either direction. (Plaintiffs' Exhibit 20, pp. 115-16)

Using actual field data on Lake Michigan current speeds and persistence (TR. 1971-72) Dr. Csanady testified:

> Q. Within this coastal zone or near-shore zone and in the area that is independent of the friction effect of the shore—you have indicated it is approximately three miles out—apart from the coastal jet phenomena, has your research and study given any indication of the speed ranges of these currents?
>
> A. Yes, the typical velocities of wind-driven currents, driven by very strong winds, is in the neighborhood of one foot per second, 30 centimeters per second.

Q. Would you translate the 30 centimeters a second into miles per day?

A. That is approximately 16 miles per day. That is a typical wind-driven current under conditions other than summer.

THE COURT: Conditions other than summer?

THE WITNESS: Other than summer conditions.

BY MR. KARAGANIS:

Q. In the summertime are there other conditions which can occur which can effect the speed of those currents?

A. Yes, in the summertime the top layers of the lake warm and the thermocline forms at approximately 10, 15, 20 meters depth. That thermocline acts as a set of roller bearings, if you like. There is a little friction in that, and the waters can slide essentially without resistance on that surface. Therefore, the currents become stronger in the summer and the coastal zone currents, which we call coastal jets under those conditions, are rather stronger.

Typical velocity is perhaps 50 per cent higher than I mentioned before, to say 25 miles a day for a good strong coastal jet.

But this is not the peak velocity. We have seen a peak velocity as fast as approximately 35 miles a day. (Dr. Csanady, TR. 1950-52)

Q. With respect to this slug, again to clear the record, would it be fair to say that when you talk about slug, you refer to a discrete mass or discrete body of polluted water?

A. Yes, that polluted water that enters Lake Michigan following the heavy rainstorm. It is a large body of water that forms a cloud or patch or slug in the lake water. (Dr. Csanady, TR. 1996)

> Q. To summarize your evaluation of whether the pollutants from the Milwaukee harbor area reach Illinois waters, do you have an opinion as to whether waters from the Milwaukee harbor containing sewage wastes reach Illinois waters?
>
> A. Yes, Mr. Karaganis. In summary of my testimony, I believe that under a combination of adverse circumstances, notably heavy rainstorm, which generates the large slug of effluent at Milwaukee, and a subsequent rapid transit of the pollutants via the currents, a relatively fast and persistent current, under those circumstances the slug originating from Milwaukee and arriving in Illinois waters would contain enough fecal coliforms or perhaps other objectionable constituents to constitute an objectionable level of concentration. (Dr. Csanady, TR. 2063)

Defendant's experts also agreed that their own data showed currents of strong enough persistence to move pollutants discharged from Milwaukee to reach Illinois waters.

Dr. Pritchard testified for the defendants and acknowledged on cross-examination:

> Q. There is no question that everything you have seen indicates that a substance which is placed at Milwaukee will reach Illinois waters, isn't that right?
>
> A. Correct, at some frequency. (Pritchard, TR 7175)

Harry Carter also testified on direct examination for defendants as follows:

> Q. So that means that with respect to the 13 months during which you had data from Zion, there were four times when effluents released at Milwaukee have reached the Illinois state line, assuming that the currents between Milwaukee and the state line were as they were at Zion during the testing period?
>
> A. That is correct. (Carter, TR. 8671)

Defendants' experts measured current speeds which showed speeds and persistence sufficient to move the effluent from Milwaukee to Illinois in as little as 52 hours (a little over two days) or as long as 122.5 hours (a little over five days). (Defendants' Exhibit 905, letter from Carter to McCabe)

Finding By The Court: Pathogen Survival:

> "The bacteria live on the order of four to eight days in the water, and there is a phenomenon known as regrowth, which can result in a substantial replacement of bacteria which die by the birth of new bacteria occurring during the southward flow. Viruses, which I regard as the more serious of the two principal types of pathogens with which we are concerned, live for a week and a half or two weeks in warm water and can live for months in cold water." (A. 28)

Edwin Geldreich testified as to bacterial survival:

> Q. With respect to a mass of untreated or improperly treated sewage, is persistence a phenomenon that is likely to occur?
>
> A. Yes.
>
> Q. So we have persistence straight, that is a period at which the original concentrations remain at or near the discharge level and only after the period of persistence do they then begin to demonstrate the 90 percent die—off curve, is that right?
>
> A. That's correct.
>
> THE COURT: How long does it take them to die off? Do they all go at once?
>
> THE WITNESS: It will take about 2 to 4 days.
>
> THE COURT: More?
>
> THE WITNESS: Yes, sir.

THE COURT: So in other words, instead of having 2 to 4 days, you have 4 to 6 days.

THE WITNESS: Yes, sir.

BY MR. KARAGANIS:

Q. With respect to the question of nutrients being in sewage or in sewage discharge——

THE COURT: I really didn't state that right. It would be 4 to 8 days, rather than 4 to 6 days.

MR. KARAGANIS: It could be as high as 4 to 8.

THE WITNESS: Yes, sir. (Geldreich, TR. 3094-95)

As to virus survival Dr. Melnick testified:

Q. How long a time are we talking about for enteric viruses to die off?

A. It depends upon the time of the year. It depends upon temperature. As there is temperature fluctuation, this varies a good deal.

Q. Let's take the summer time with water temperatures at 70 degrees.

A. I would say then it would probably take about two weeks for it to die off.

Q. Is that a range or is there longer times?

A. It ranges. A virus may persist for months actually, and as you get into the cooler weather, it will persist for an indefinite period of time. (Dr. Melnick, TR. 2199)

Finding By The Court: Pathogens In Illinois Waters:

"There is no doubt that viruses and bacteria have a long enough life span to reach Illinois in the persistent currents which occur a number of times a year. How

many times a year this occurs is, of course, impossible to state with any certainty. The plaintiffs' experts estimate something like a dozen times a year. The defendants' experts estimate that it is more like four times a year or possibly even two times a year. But both sides concede that their estimates could be off either on the high side or the low side." (A. 29)

Dr. Csanady testified for Plaintiff:

Q. Dr. Csanady, with respect to the meteorological conditions under which these movements can occur, is it possible to predict with specific accuracy how many times a year or how many times a month or how many times a week these meteorological and current phenomena would occur that will take this material into Illinois waters?

A. Certainly not with any specific assurance for any given year. One can give some guidelines in this regard that the frequency of cyclonic storms is such and such. They occur with a certain regularity, and there are summers when one would encounter a number of such heavy rainstorms in quick succession. Once a weather patterns gets established, as we all know this winter, it tends to remain in that same pattern.

So if one has a wet summer, for example, one would have a number of successive rainstorms at perhaps weekly intervals.

One cannot say that it would happen in any given year with any given frequency, but perhaps one can estimate the frequency of this in the neighborhood of perhaps once a month on a longer term basis.

Q. When you say once a month, is that a frequency on a long term basis of 12 times a year?

A. Yes, as a very crude estimate. I don't want to put very great reliance on this number. It is weather de-

pendent and depends on some other factors as well. So there is a lot of randomness in this.

Q. In a given year, could it be more than 12 times a year?

A. I assume it could be more. I assume it could be less. (Dr. Csanady, TR. 2058-59)

Dr. Pritchard testified for defendants:

Q. Now, in terms of the current persistence, and you mentioned that in 1973 you had found current persistence, or, in other words, the length of time that the current persists times the current speed, to be, I think you said, four excursions of sufficient length.

A. That is correct.

Q. That does not mean, again, as we discussed in terms of the other current meter values, that any one year is always going to be four times, does it?

A. No. Sometimes it would be zero, and sometimes it would be more. And some statistician could comment on that. I am not professing to state how representative that is.

Q. So with respect to current persistence and current speed, we have some information which gives us a window in time which tells us that this is what happened that year from which we may generalize but we can't come up with that this is always going to be the number, isn't that right?

A. Correct. (Pritchard, TR. 7168)

It must be emphasized that these estimates only relate to direct non-stop transport of pollutants from Milwaukee to Illinois waters. Any viruses which settle to the bottom can live for months and can be resuspended and trans-

ported by new currents as a new source of infection weeks or months after the initial discharge.

Q. So that we can have material lying on the bottom in a form, say, of fecal matter, which during a storm can be resuspended and carried by whatever currents happen to be going by, isn't that right?

A. If there is fecal matter there. I don't say that there is. I don't know.

Q. But if there is——

A. If there is, it can be resuspended.

Q. And having been resuspended, it will go wherever the currents will take it, is that correct?

A. That's correct. (Carter, TR. 8862-63)

Defendants' witness Cliver acknowledged:

Q. Let's take a situation such as a wintertime situation. Let's assume further—and by "wintertime," let's take 35 degrees Fahrenheit or 38 degrees Fahrenheit as the water temperature.

Let's assume that we are on a regular basis putting out solids materials which have viruses in them, and the solids materials—some of it settles in the harbor bottom, some of it gets out into the lake and is moved, and maybe it settles somewhere else, and as the winter progresses, progressively more cumulative materials are deposited.

You are saying that under some circumstances these materials will settle to the bottom, is that right?

A. Under some circumstances.

Q. And those are typically quiescent conditions, are they not?

A. Yes.

Q. And with respect to quiescent conditions, after they have settled to the bottom, if turbulent conditions come up, they can be resuspended, can they not?

A. Yes.

Q. So if we have a body of virus or viral solids-associated material that has survived over time, it can be resuspended, and while it is not now coming from its original source, it is still a viable source in infection within the lake, is it not?

A. If it doesn't also get inactivated somewhere along the line. But, yes, under the conditions you are describing. (Cliver, TR. 10,323-24)

Finding By The Court: Dilution:

"In addition to the die-off of the pathogens themselves, there is another factor which ameliorates the problem to some extent, and that is the phenomenon of dilution. The water which comes down in a parcel doesn't come down intact in the exact form that it left Milwaukee Harbor. Rather, it dilutes with the other water in the lake.

"The experts are in conflict as to the amount of dilution and even as to the proper scientific principle to be applied to determine the amount of dilution. Notwithstanding that dispute—which I resolve in favor of the plaintiffs on the basis of what I perceive to be the greater credibility of their witness on the subject—there still is not sufficient dilution to eliminate the viruses and the bacteria from the water which we know arrives in Illinois from Milwaukee on some occasions during the course of the year." (A. 29-30)

As discussed below, much of the dilution argument is superfluous because water intake plants will reconcentrate

the pathogens. But even using the defendants' own dilution formula, dilution is still insufficient to eliminate a hazard.

Dilution is calculated by a series of complicated mathematical formulas based on observed data on how fast patches of water spread or expand over time. The speed with (or time in) which the patch spreads is called diffusion velocity. Defendants used a mathematical formula called the Okubo-Pritchard Model. Defendants' witness Carter was asked to use his own Okubo-Pritchard formula and to plug in actual data. Using actual data on fecal coliform counts taken at Milwaukee Harbor entrance by the defendants (see Plaintiffs' Exhibits 146-149) and using diffusion velocities actually measured by defendants, Carter testified that dilution could be as little as 5.286 to 1 over the distance between Milwaukee and the Illinois line. (TR. 8920) Moreover using die-off curves developed on bacteria in Lake Michigan tests Carter predicted fecal coliform values in Illinois waters of 2,179 per hundred milliliters:

> Q. Yes, the .58 to start with, and let's start again with the assumptions being here that we are dealing with the results you calculated for 13,000 CFS with a .2 diffusion velocity with 35,000 fecal coliform. That was 6,621 at the state line.
>
> A. I get 2,179.
>
> Q. That is after your die-off and that is after your dilution at the state line, is that right?
>
> A. That is correct. (Carter, TR. 8931)

Geldreich testified as to the significance of fecal coliform counts as follows.

> Q. With respect to the presence of salmonella and shigella and the opportunistic pathogens and E coli

and R-factor antibodies, how do we test for the presence of bacterial pathogens?

A. Routinely we do not test for bacterial pathogens because there is no one test, no one procedure available at this time that can adequately recover all known pathogens that may be in the polluted water. Therefore, we must go to the concept of using some kind of an organism which is very common in the intestinal tract of warm-blooded animals and use it as an indicator of the presence of fecal contamination in the water.

* * *

More recently, as I mentioned, I have been involved in the refinement of the old concept, what we call now total coliforms, as an indicator, and the refinement into this procedure, to be more specific, to those which are related to fecal material. We call these fecal coliforms. (Geldreich, TR. 3056-57)

Q. And with respect to the incidence of, let's say, single day values, you indicated to the Court that if you had, say, 1 to 70—was that the range you used on fecals—that you might have a 7 percent likelihood of a salmonella or some pathogen being present?

A. Salmonella.

Q. And as you went to 200——

A. We would have about 28 percent.

Q. And if you went to 1000, you would have——

A. 95 percent approximately.

* * *

Q. And the typical value that is used for bathing beaches or bathing waters is what number?

A. 200 per 100 ml fecal coliforms.

Q. That is normally as a geometric means, is it not?

A. Based on data collected over a period of 30 days, and during the bathing season, and so on.

Q. With respect to the individual day, if you had a level over 200, you would have a risk of pathogens being present, would you not?

A. Yes.

Q. And if you had high quality water that was relatively free of bacterial contamination, would you have any opinion as to whether we should allow individual days to exceed 200?

A. No. I have an opinion, but I do not like the approach where we will excuse the problems we have with slugs of pollution, which sometimes I am asked by the geometric mean. (Geldreich, TR. 3102-03)

Much of the talk about dilution is superfluous. Public water supply treatment plants reconcentrate pollutants on their intake filters. Dr. Wellings testified:

Q. Now, from the standpoint of raw water supplies, in your opinion, is it sufficient, based on your knowledge in the area based on looking at the Clark article, Defendants' Exhibit 34 which found solids coming through a water treatment plant, in your opinion, is it safe from a public health standpoint to rely solely on the water treatment plant to remove viruses?

A. We have got to go according to the rules of public health, and that is, to protect the water supply.

Your raw water supply needs to be protected in the greatest possible way, and as I said before, we are spewing out more and more effluent over the U.S.A. and until we get to the point where we reduce the virus

load and the bacterial load before discharge, we are going to be in a very sad shape.

* * *

Q. With respect to viruses in water, there has been a lot of talk about dilution here as being the solution to the problem, and you have heard the old refrain dilution is not the solution to pollution?

A. Right.

Q. With respect to viruses in water, assume we dump out large quantities of virus and we dilute it like mad. I mean, we put in all the water that is available to dilute it.

Would you tell the Court what happens when water is taken into a municipal treatment plant and run through filters?

* * *

A. You bring in raw water out of the lake and you are passing it over filters and it can be concentrated. It will be by all of the organic matter that is present there.

Then you have a breakdown or something happens, which happens all the time in treatment plants. There is a breakdown or the filter isn't functioning properly, and boom, it comes through as a concentrate, sludge.

By Mr. Karaganis:

Q. So a filter in a water treatment plant can take a large mass of water that is out in the lake and, as it runs the water through the filter, the small particles that are in that water can literally be concentrated on the water treatment plant incoming filters, is that right?

A. That is right. (Dr. Wellings, TR. 13,268-69)

Finding By The Court: Disease Hazard:

"Once these pathogens arrive in Illinois waters, they can infect and cause disease in residents of Illinois. This takes place in two ways: by ingestion of these waters at bathing beaches by swimmers and by ingestion of drinking water containing these pathogens. . . .

"In regard to the bathing beaches, I am satisfied that the persons who use those beaches cannot do so with safety if there are any significant numbers of viruses in the water. There is a question as to how many viruses it takes to cause an infection. I can't solve that one. The experts are not in agreement but I believe, first of all, from the evidence I have heard, that the number is small. If one virus is insufficient, it still need not be hundreds. Moreover, the evidence shows that any viruses which do reach Illinois waters are likely to do so in great numbers. (A. 34)

Dr. Melnick testified:

Q. With respect to persons who swim, can they pick up these viral infections?

A. Yes, if they have minor cuts or abrasions on their skin, if they get water in their mouth or nose, they could pick up the virus and become infected. (Dr. Melnick, TR. 2218)

* * *

Q. Doctor, we have talked about plaque form units or infectious units. How many infectious units does it take to infect the human being?

A. I think regardless of whether you are talking about a human being or cultures and so on, if you have susceptible cells and you have an infectious virus unit present, you can set up an infection.

Q. With a single unit?

A. With a single infectious unit.

Q. With respect to——

A. That doesn't mean a single unit always sets up an infection. It has to come in contact. For example, if you put an infectious unit on the surface of someone's skin, it may not set up an infection; but if you put it inside someone's mouth, that would set up an infection. (Dr. Melnick, TR. 2200-01)

Dr. Berg testified:

Q. With respect to the question of numbers, Doctor—and I am not going to go through with you a long litany of taking you from what the base case is and then percentages down—but let's just assume for the moment that we have 320 million gallons a day of sewage leaving the Milwaukee area and this is treated effluent, whatever the case may be, but it has, let's take, 10 plaque-forming units per liter.[22] (Dr. Berg, TR. 12094)

Q. Let's talk about the users of water along Lake Michigan and let's assume, whatever the dilution is, that this mass of water travels to Illinois, whatever dilution you want to assume.

A. I think any virus that man contacts is a potential hazard. An amount that great, I would say——

Q. Even if we talk about a low levels per gallon, what are we talking about when we talk about 320 million

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[22] To be conservative counsel for plaintiff selected an extremely low number of virus in the effluent. Dr. Wellings and Dr. Berg both testified as to the extremely poor viral removal efficiencies of secondary activated sludge plants. Given an average of 7000 viral units per liter, Milwaukee's daily discharge could be as high as 7000 viral units per liter.

gallons? If we talk about 10 per gallon, is that roughly 3 billion viruses?

A. This is about what you are talking about, yes.

Q. If we are just talking as low as 10 per liter coming out of there, we are talking in excess of 10 billion viruses a day?

A. More than that, I think. You are talking 10 per liter. That is about 40 per gallon roughly, and then you multiply that by 320 million gallons.

Isn't that the number you gave me?

Q. Yes.

A. 320 million?

Q. So we are talking in the billions or trillions?

A. Yes, I think so.

Q. From the standpoint—I realize that this is a method scientists use in terms of talking about systems in water in terms of concentrations per liter, but before when we were talking about a solid particle in solids, you talked about it as wet weight, numbers per gram.

A. Yes.

Q. From a public health standpoint, if we are talking about millions of viruses being discharged daily, is it appropriate to try to talk about dilution of those viruses, just letting them out and diluting them? Let's assume that they dilute to 1,000,10,000 [sic].

BY THE WITNESS:

A. The answer to that question is that what is really important is what impacts man, what contacts man, whether he is a swimmer or whether he is a possible ultimate consumer by way of drinking it.

I don't think that any viruses should be discharged to a water that man might contact.

By Mr. Karaganis:

Q. With respect to the removal of viruses and what we call this double tier of detection, would it be fair to characterize your previous testimony to say that in the sewage treatment plant, we ought to remove solids to the maximum extent possible, we ought to remove organics to the maximum extent possible, we ought to remove ammonia as an interference with effective chlorine disinfection?

A. Yes, if there is any likelihood at all that these materials in the effluents will eventually reach waters that man might consume.

The Court: How far would you go from an economic standpoint to achieve that?

The Witness: I think that is really a question the community has to decide for itself, but in terms of the potential public health hazard, I think any virus that you have at all is a potential risk. So I think that to the extent it is possible, you ought to remove all of the viruses that you can. (Dr. Berg, TR. 12096-12101)

Finding By The Court:

"There are fecal coliform counts on Illinois beaches which fail to demonstrate any pollution coming from Milwaukee, but again, that does not prove that viruses are not in the water." (A. 34)

To the extent this finding can be interpreted that there is no evidence of fecal contamination on Illinois beaches, plaintiffs would respectfully dispute such a finding. Lake County beach records show severe fecal contamination. (Plaintiffs' Exhibits 172 & 173). What the trial court ap-

pears to be finding is that the fecal coliform found on those beaches cannot be physically identified as Milwaukee fecal coliform.[23]

The trial court had ample evidence that low fecal coliform counts are no assurance that viruses are not present.

> Q. Dr. Berg, with respect to viruses, given all the problems we have with detecting viruses, and hepatitis we can't detect at all in water even though it may be there, if we have very low levels of fecal coliform which, as the Court knows now, is used as an indicator of bacterial pathogens, if we have, say, zero fecal coliform or 1 fecal coliform, does that mean we are free of viruses?
>
> A. No. We have detected viruses in waters occasionally when there have been no fecal coliform by standard tests. Moreover, it is quite possible, and we have managed to demonstrate this in the laboratory that you can chlorinate a primary effluent, for example, which contains fecal coliforms at levels at 10 to the 6th and 10 to the 7th of a hundred ML's, and chlorinate with a level of chlorine for a sufficient period of time

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[23] This same identity of pollutant source problem was addressed in *United States* v. *Ashland Oil & Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974) where the court held:

> "The only remaining question of importance in this case concerns whether or not the government must bear the burden of establishing not merely that oil was discharged into a tributary of a navigable stream, but also that, in fact, the oil reached and polluted the navigable river. To state the question is to recognize the impossibility of such proof in many if not all cases. Drops (or barrels) of oil carry no fingerprints. At the juncture of the Pond River and the Green River water analysis which might show oil pollution could not possibly prove which polluter discharged it, in what proportion, or on what occasion. Nor where many offenders are involved in creating a great social problem is such proof constitutionally required." 504 F.2d at 1329.

can destroy all of the fecal coliforms measurable by standard techniques that still leave a certain proportion of the originally existing virus viable and demonstrable. (Dr. Berg, TR. 12083-84)

Finding By The Court:

"As far as the treatment plants are concerned, the testimony of Dr. Wellings convinces me that viruses do get through water filtration plants attached to and embedded in solids, which can go through the filters of those plants, both when the plant is being operated properly and even more so should the plant experience a breakdown." (A. 36)

The opinion of all public health experts was unanimous that we cannot rely on water treatment plants as an excuse to discharge contaminated water.

Dr. Wellings:

Q. Doctor, directing your attention to Defendants' Exhibit 34, I believe it is, which is the paper, "Virus Study for Drinking Water Supplies," by Clark, et al.; directing your attention to page 4——

* * *

Q. I think page 4 will allow you to see one of the problems here.

Directing your attention to page 4, one of the laboratories involved in the tests was the—what do they call it, the Gulf Coast Laboratories?

A. Gulf Coast sample—yes.

Q. With respect to the Gulf Coast laboratory, after they took the water from the treatment plant now,—this is after going through a treatment plant, isn't that right?

A. That is right.

Q. So after going through a municipal treatment plant with all of the typical methods of coagulation and filtration, et al., what problem did they find on their samples that they took from the Gulf Coast Treatment Plant?

A. Particulates were clogging the filters.

Q. Now, are you familiar with the methodology that they used?

A. Yes. I am very familiar with it.

Q. Did they analyze the viruses in those particulates?

A. They did not.

Q. So we had coming through a municipal waste treatment facility particulate matter, is that right?

A. Right.

Q. That particulate matter, based on your work, is one of the principal repositories for viruses, is that right?

A. That is right.

Q. But the material that was done by Clark, they did not analyze the particulates?

A. They did not.

Q. Now, Doctor, in your opinion, if a treatment plant let through particulate matter, a water treatment plant, in your opinion, can that particulate matter contain viruses?

A. Yes.

Q. With respect to that, if it lets particulate matter through, if particulate matter comes through the water treatment plant, can those viruses be protected from chlorine?

A. The only way that virus, as I see it, with the rigorous treatment that water is subjected to in a good

treatment plant, the only way that viruses can survive that treatment, there must be solids associated, and I don't mean adsorbed to. I mean being an integral part of.

Q. The solid?

A. The solid, right.

Q. Now, with respect to that data, based on what you know and based on the material you see there of particulate matter actually coming through a treatment plant, can we rely in your professional opinion on water treatment plants as being our single line of defense against viral contamination?

THE COURT: Excuse me. This was a water treatment and not a waste treatment?

THE WITNESS: That's water treatment.

MR. KARAGANIS: Water treatment, your Honor.

BY MR. KARAGANIS:

Q. It was a water treatment plant, your Honor, that they tested for viruses in water. They found particulate matter—correct me if I am wrong, Doctor.

They found particulate matter coming through the water treatment plant after all the treatment levels, is that right?

A. Right.

I might point out that other people have done the same thing and have found that drinking water in certain areas is more difficult to filter than some of the sewage, and this is in Texas.

Q. Why is that?

A. Work has been done.

I don't know why it is except that their raw water is so terrible to begin with, and the clean up is very difficult.

Q. Now, from the standpoint of raw water supplies, in your opinion, is it sufficient, based on your knowledge in the area based on looking at the Clark article, Defendants' Exhibit 34 which found solids coming through a water treatment plant, in your opinion, is it safe from a public health standpoint to rely solely on the water treatment plant o remove viruses?

A. We have go to go according to the rules of public health, and that is, to protect the water supply.

Your raw water supply needs to be protected in the greatest possible way, and as I said before, we are spewing out more and more effluent over the U.S.A. and until we get to the point where we reduce the virus load and the bacterial load before discharge we are going to be in very sad shape. (Dr. Wellings, TR. 13264-68)

Dr. Berg testified:

Q. Doctor, what is there about a water treatment plant in terms of getting hit with raw water contaminated with virus which would cause concern?

A. Well, if you are talking about the kinds of plants that they describe in these two papers, I think it probably makes no sense to be concerned about a virus hazard in the liquid portion of the water that is coming out of that plant with the chlorine residual of anywhere from 1 to 2 parts per million of free chlorine as they describe it, which means there is a substantial —even at the very high pH levels they sometimes use, there must have been a fairly high level of hypochlorous acid, which is a very fast killing chlorine, and with the low turbidities they had, except that one cannot be

sure that the material that is characterized as turbidity did not contain viruses, there is no way to know even with that small amount of turbidity which cannot be readily removed even by a well operated treatment plant.

Q. When you talk about turbidity, would you explain what turbidity is in terms of a substance? Is turbidity solids?

A. Solid coloidal material.

Q. By "coloidal material," would you please explain to the Court what that is without a detailed chemical explanation? What do we mean by "coloidal?"

A. Well, it is a form of suspended material.

Q. It is a very fine form of suspended material?

A. Yes.

Q. Very extremely small size?

A. It can be, yes. It would have to be quite small.

Q. Can that coloidal material encase or encapsulate solids?

A. Encapsulate viruses, do you mean?

Q. Or viruses rather.

A. I would expect it could, yes.

Q. Are there any other circumstances—that is in the normal operation?

A. Yes.

Q. There are circumstances with treatment plants with respect to the public health concern—well, I will go back a second.

They can operate at the level you have just described 100 percent of the time?

A. I wouldn't expect they would. If a treatment plant breaks down at some point in time for some period of time, even for a very short period of time, during that period of time when there is perhaps inadequate removal of the solid material, when there is lack of chlorination, then any impact that raw water coming in may have by way of pathogenic agents, viruses or anything else, can presumably become a problem.

Q. Doctor, are you familiar with the public health principle articulated in public health, particularly in the fields of microbiology and virology of a double tier protector?

A. Yes. The multiple barrier——

Q. Or multiple barrier theory?

A. —that we normally speak of, which means that you try to protect the raw water as much as you can so that in the event that something does happen at a treatment plant that you don't bring about an insult that can be carried through the plant and in this respect, carry through into the finished water pathogenic organisms or viruses. (Dr. Berg, TR. 12080-83)

Dr. Melnick testified:

Q. Doctor, can't we rely on water treatment plants to disinfect?

You mentioned reservoirs where we get our water. Do we have to worry about the reservoirs, or can't we rely on water treatment plants to disinfect or remove the viruses?

A. I think it is dangerous to rely on water treatment plants alone. We need water treatment plants, but if the load on the water treatment plant is excessive, then a virus may slip through.

The water treatment plants depend upon people who run them. There are all types of failabilities as far as human beings and mechanisms are concerned. The safest approach as far as human health is concerned is to keep virus as far away from the water treatment plant as possible.

That should be the measure of last resort, not first resort.

Q. With respect to the water treatment plants, have there been instances in the United States where viruses have gotten through water treatment plants and caused outbreaks?

A. There have been a number of outbreaks that have been documented by EPA as infectious agents spread by water. This is not easy to earmark as far as viruses are concerned because of the things we talked about earlier. There is usually a very high rate of sub-clinical to clinical infection. So it is difficult to know whether the clinical infection in the community ever had its origin in someone who drank the water or was he a contact of somebody who drank the water? Because it is so difficult to trace, it is difficult to get a concrete answer to such a question. (Dr. Melnick, TR. 2191-92)

Mr. Edwin Geldreich testified:

Q. Are you aware of instances where bacterial contamination has, by human inadvertence or breakdown of equipment or anything else, gotten through water treatment plants?

A. Yes, sir.

Q. Does that have any effect on your opinion that we ought to control it at the source?

A. That is why I am so concerned about the fact that we must control pollution at the source, because we

cannot rely on the water plant operation to handle the full load of the problem. (Geldreich, TR. 3106-07)

B

Eutrophication

Finding By The Court:

"I turn now to the second phase of the case, that involving the matter of accelerated eutrophication of Lake Michigan.

"I have no doubt whatever from the evidence in this case that the amount of phosphorus in Lake Michigan is increasing. No one knows how much phosphorus was in the lake 20 years ago, nobody knows how much phosphorus was in the lake yesterday; but what is clear from the evidence beyond any doubt is that when phosphorus is put into the lake, it stays there for a long time. It stays there either in solution in the water itself or in the bio-mass—in the algae, the organisms, both animal and vegetable, which use phosphorus in their life cycles—or it is in the bottom sediments, from which it can be recycled, that is, put back into solution over time." (A. 42)

Dr. Claire Schelske, a limnologist from the University of Michigan testified:

Q. [By Mr. Van Hecke] So today, as you sit here on the witness stand and I stand here before you, we have phosphorus that was put in that lake years ago that is still affecting that lake?

A. That is overstating what I have said in two ways. One is that if you would look at the increase of phosphorus input to the lake, you would discover that a large fraction of phosphorus that was added to Lake Michigan in historical times effectively has been added

within the last 30 years, and a lot of this has come for two reasons. One is increasing population—three things—increased sewering, and the third thing is the increased use of phosphorus in detergents.

All of these things added together means that the amount of phosphorus that got into the lake or could potentially get into the lake, has increased greatly, much greater than would be expected if you looked at any of those parameters individually. (Dr. Schelske, TR. 2973-74)

THE COURT: How does phosphorus, once in the lake, get out at all?

THE WITNESS: I guess really there are three main sources, three ways that you can lose phosphorus from the lake.

One is it can flow out through the Strait of Mackinac into Lake Huron. The second way it can get out of the lake, which really isn't going out of the lake at all, is to be sedimented to the bottom. This removes it from the water, but that doesn't mean that it can't be recycled from the sediment back into the water.

The third way it can be taken out of the lake is through some kind of a harvesting procedure. Say when these alewives were dying, if we were to pick up the alewives and gotten them out of the drainage basins, this would remove phosphorus. (Dr. Schelske, TR. 2974-75)

THE COURT: Actually, nobody is harvesting it, I take it, the third alternative?

THE WITNESS: No, there really isn't significant harvest.

THE COURT: So does most of it go to the Lake Huron or does most of it go down to the bottom? That is lost, I mean.

THE WITNESS: Again, this comes back to this long renewal time. We know that our salvation isn't to dump this stuff into Lake Huron because we are only taking 1 percent of the volume of Lake Michigan out every year. So that any that is left in the water, 99 percent of it is going to remain at the end of that year.

So this phosphorus that is put into the lake is certainly staying in that lake basin. It is either in the water or in the sediments or in the organisms that are in the water and sediments. (Dr. Schelske, TR. 2976)

THE COURT: Does it become dissolved when it is in sedimentary form over time?

THE WITNESS: It can. The benthos that live in the bottom of the lake can eat some of these organic materials that are sedimented to the bottom.

They are like any other organism, animal type organism. When they ingest materials, they excrete materials as well, and these excreted materials contain phosphorus. So some of it has to come back that way.

There are also chemical reactions that can take place in the sediments that will release phosphorus.

Again, coming back to this circular causal system, the greater the productivity in the system, the greater amount of relief of this particular nutrient from the bottom. So that by accelerated eutrophication, you tend to intensify some of these processes. (Dr. Schelske, TR. 2979)

Dr. Schelske described the process of eutrophication as follows:

Q. [By Mr. Karaganis] Doctor, let's see if we can get some nomenclature straight. What are phytoplankton?

A. Phytoplankton are the microscopic plants that are suspended in the water. They are free floating organisms. (Dr. Schelske, TR. 2818-19)

Q. Doctor, with respect to phytoplankton populations, you have mentioned three general categories. I think you mentioned the diatoms, the blue-green, and what was the third category?

A. Green algae.

Q. In discussing or categorizing lakes and their concentrations or quantities or relationships of these various types of algae, is it typical to refer to the trophic status of the lake?

A. Yes, that is true.

Q. That is t-r-o-p-h-i-c?

A. Yes.

Q. What do we mean by the trophic status of a lake?
A. In terms of nutrients, this refers to the degree of nutrient enrichment of the water. In limnological terms, we have oligotrophic lakes, which have the fewest concentrations of nutrients, the smallest concentration of nutrients, and there is a gradation of lakes then to those that are termed eutrophic. These are the lakes that have the highest concentration of nutrients.

Q. When you say the highest concentrations of nutrients, is there a relationship between the concentration or the load of nutrients and the amount of plant growth or algal growth that is there?

A. Yes, that is true. In fact, generally speaking when people talk about eutrophic or oligotrophic, they are really talking about the quantity of biological materials present in the lake, rather than the concentration of nutrients because the biological system is the one that responds to the nutrient inputs. So in the oligotrophic lakes we have very small population, small concentrations of phytoplankton, and at the other extreme in this system, in the eutrophic lakes, we have the largest concentrations of phytoplankton organisms.

Q. From the layman's standpoint, is it the organisms or the concentration of nutrient that physically manifests itself as the condition?

A. It is the organisms themselves.

Q. What physical manifestations would a layman see if he looked in an oligotrophic lake?

A. I think what the layman sees, first of all, in an oligotrophic lake is something that they think of as being clean, and this is characterized by very blue water, by clear water, and probably less objectionable growths or smaller growths of organisms along the shorelines and on piers and things of this type.

Q. What you refer to as clear water, is that water that, if you are on the surface, you can see down for some depth?

A. Right, as an example, in limnology we have what is termed a secchi disc, which is a disc that is about eight inches in diameter, which we lower into the water on a line that is calibrated and watch it until it disappears from sight. In Lake Superior, under very good conditions, you can see this down to depths greater than 60 feet; whereas in some of the eutrophic areas of the Great Lakes, you will maybe see this at depths of less than six feet. So it is something that is very, very obvious.

Q. This murkiness or turbidity, what is that murkiness that we associate with oligotrophic? What is causing that?

A. As you get away from——

THE COURT: Oligotrophic?

MR. KARAGANIS: I am sorry, eutrophic.

By the Witness:

A. As you get away from the shoreline where there may be some influences due to suspended inorganic materials, this is almost entirely due to the biological components of the system or their byproducts. The biggest part of this is, of course, phytoplankton.

By Mr. Karaganis:

Q. Is the turbidity or the murkiness then due to the number of organisms, biological organisms, phytoplankton that are then present in the water?

A. Yes, it is due to the concentration of those organisms.

Q. What causes those organisms to be present in the water in these numbers?

A. It is adequate supplies of nutrients, abundant supplies of nutrients.

Q. Would it be fair to say for those who don't fertilize lakes normally, but fertilize lawns or gardens, that phytoplankton respond in general terms just as what we experience in terms of doing our lawns or gardens?

A. Yes, I would say that is a very similar situation.

Q. The more fertilizer we put into the lake or nutrients we put into the lake, the better crop we grow, is that right?

A. As long as the nutrients are supplied in the right portions.

Q. Now, what would be the symptoms of a eutrophic lake? You mentioned one, the color change from blue to green and from clear to murky water. What other symptoms would there be?

A. As I said, you would notice—you would have more objectionable growths of plant organisms on surfaces,

substrates, stringy filaments on the piers and rocks along the beach, and in severe cases there would be materials that would wash up on the shore during storms. There would be a smell associated with the water, and when the water is deep enough, these materials that are produced by excessive plant growth settle to the bottom and deplete the supplies of oxygen, creating an anoxic condition in the water. (Dr. Schelske, TR. 2821-26)

Q. Based on your evaluation of the data found around the Milwaukee vicinity, as well as your own work throughout Lake Michigan, do you have an opinion as to whether Lake Michigan is suffering from a condition of accelerated eutrophication?

A. Yes. I think it is suffering from that.

Q. And with respect to the cause of that accelerated eutrophication, is there a particular nutrient which is primarily responsible for the enriched status?

A. Yes. We have called that a controlling element, which is phosphorus. (Dr. Schelske, TR. 2883-84)

Finding By The Court:

"The evidence of the accelerated eutrophication is the decrease in dissolved silica, which I find is due to its utilization by diatoms; a decrease in the diatom population; and an increase in blue-green algae, both in the in-shore zone and the off-shore zone." (A. 44)

Dr. Schelske testified:

Q. With respect to Lake Michigan, have you studied the processes of nutrient enrichment and the status or the trophic status of Lake Michigan?

A. Yes.

Q. Are we seeing anything on Lake Michigan at this time which in any way resembles the sequential process that you described on Lake Erie, namely from nearshore to whole lake, or expanding into the lake?

A. Yes. I think a case can be made that all of these things are happening in the lake.

Q. With respect to the process of eutrophication, as you described it, what is it if anything is happening in Lake Michigan that leads you to state that these processes or this process of eutrophication is occurring in Lake Michigan?

A. There are actually two things that come to mind immediately on that. One is the increased algal abundance that has been observed at the water filtration plant at the city of Chicago over some 50 year span.

The other more convincing story, and one that encompasses the whole lake, is the phenomenon that we have called silica depletion in the lake. This relates back to what we discussed earlier, that as the diatom standing crops get larger and larger in the lake, they consume more and more of the silica that is present in the lake, until eventually you have depleted the silica, creating a situation where silica is limiting in the lake.

We see this manifested in Lake Michigan.

Q. I think you mentioned in terms of the process of eutrophication that in the continuum of occurrence, there is first the development of a large bio-mass of diatoms, which exhausts the silica, and then, having exhausted the silica, they become limited by that exhausted supply and allow other organisms, such as blue-greens, to become dominant, is that right?

A. Yes. That's right.

Q. Have you seen any evidence of this species dominance of blue-greens that you have described as characteristic of the eutrophication process present in Lake Michigan?

A. Yes, we have observed this throughout the lake actually.

Q. When you say you have observed it throughout the lake, has it first manifested itself in any particular portions of the lake; in other words, where does it show up first?

A. It is going to show up first in the near-shore zones and then will spread to the offshore parts of the lake.

Q. Would it be fair to say the southern end of Green Bay and western Lake Erie are considered the classic examples of eutrophication in the Great Lakes?

A. I think to people familiar with the Great Lakes work, that would be very true.

Southern Green Bay hasn't gotten the publicity in the newspaper that western Lake Erie has.

Q. With respect to the process of silica depletion and the changeover, have you seen any data or reviewed any reports with respect to the development of this process in the Milwaukee Metropolitan area?

A. Yes, I have actually examined a couple of sources.

Q. This process that you described of eutrophication, the exhaustion of the silica, the shift in species dominance from diatoms to blue-green, is that often referred to as a process of accelerated eutrophication?

A. Yes, it has been.

Q. When you say you have reviewed data with respect to the Milwaukee Metropolitan area, I show you what has been marked as Plaintiffs' Exhibit No. 144, a paper or report by A.M. Beeton and James Barker.

Have you reviewed the paper?

A. Yes.

Q. I show you what has been marked as Plaintiffs' Exhibit 2, a two volume work entitled "An Environmental Study of the Ecological Effects of Thermal Discharges from Point Beach, Oak Creek, and Lakeside Power Plants on Lake Michigan."

Have you reviewed that document as well?

A. Yes, but I would have to confess that I haven't read every page of it.

Q. Have you reviewed data from that document?

A. Yes.

Q. Did the Beeton paper, Plaintiffs' Exhibit 144, involve a study of the lake in any particular area?

A. This was centered around the Oak Creek power plant.

Q. Where is the Oak Creek power plant?

A. It is located south of Milwaukee.

MR. KARAGANIS: For the record, your Honor, in Plaintiffs' Exhibit 144 at page 72, there is a map showing the location of the Oak Creek power station which was the subject of this study.

BY MR. KARAGANIS:

Q. With respect to Plaintiffs' Exhibit Number 2, "An Environmental Study of Ecological Effects of Thermal Discharges from Point Beach, Oak Creek, and Lakeside Power Plants on Lake Michigan," was that also a study of power plants on the Wisconsin side of the lake?

A. Yes.

Q. Is the Oak Creek referred to in Plaintiffs' Exhibit 2 the same Oak Creek power plant?

A. Yes.

Q. Point Beach, is that to the north of Milwaukee?

A. Yes.

Q. Lakeside is right in the Milwaukee breakwater, is it not?

A. It is in that vicinity. (Dr. Schelske, TR. 2854-56)

Q. Directing your attention to Plaintiffs' Exhibit 144, would you read what Dr. Beeton had to say about the phosphorus concentrations found in Lake Michigan near the Oak Creek power plant?

A. He says, this report says:

"The near-shore phosphorus concentrations were within the range usually reported for Lake Erie and Green Bay."

Q. When you say Lakie Erie and Green Bay, are those the two locations you previously identified as being associated with the problem of eutrophication in the Great Lakes?

A. Yes. (Dr. Schelske, TR. 2877)

By Mr. Karaganis:

Q. Dr. Schelske, I show you volume II of Plaintiffs' Exhibit 2, the study by the Wisconsin Electric Power Company. I ask you whether or not there was any information contained in this study that indicated the existence or non-existence of this eutrophication process in the Milwaukee area?

A. Yes. It indicates that a problem does exist.

Q. What data is that, to your best recollection?

A. Again, there is the data we talked about previously, which was increased chlorophyll concentrations, increased standing crops or phytoplankton, depletion of silica, and high total phosphorus concentrations. Also, the species composition shift that I talked about earlier.

Q. With respect to the conclusions reached—and for the record, if we can, I should like to identify the date of this study, which is listed as September 1974, your Honor—would you read, directing your attention to page 10.049, the conclusion reached by the Wisconsin Electric Power Study as to the eutrophic conditions or the existence of eutrophic conditions in the Milwaukee area?

A. Where is that?

Q. The last paragraph there.

A. "Beeton states that increased phytoplankton abundance, increasing length of maximum populations, and decreased periods of low populations, coupled with increased abundance of blue-green algae and changes in dominant flora are indicative of eutrophication. Comparison of our data with those of earlier studies (Beeton and Holland, 1972; Stoermer and Kopinska, 1967; and FWPCA, 1968) indicates that Lake Michigan near Milwaukee is undergoing accelerated eutrophication." (Dr. Schelske, TR. 2879-80)

Q. Before we get into the situation in the Milwaukee area, when you describe the near-shore/offshore environments, or you use the terms, would you describe what the near-shore environment means in terms of nutrient loadings to Lake Michigan, in other words, the effected areas?

A. The near-shore, as we accumulate more information, it looks like the near-shore is probably a zone that is defined by physical features within the lake, and primarily one of these features is the morphometric features or the topography of the bottom.

One of the breakpoints that has been used in this case is a 40 meter contour, approximately 120 feet deep. The near-shore then would be that zone from the lake's edge out to 40 meters or 120 feet.

Q. With respect to that near-shore zone from a nutrient and chemistry standpoint, what does that mean in terms of the input of nutrients and their travel in Lake Michigan?

A. Mos of the nutrients that are put into the lake come from sources on the shore or from tributaries that empty into the lake along the shoreline. So that means that the nutrients have to be processed in the near-shore zone before they ever reach the main part of the lake.

Q. When you say have to be processed in the near-shore zone, is that near-shore zone, from what you described it, shore parallel?

A. In general it would be, yes.

Q. Would it be fair to say then that it is the near-shore zone that receives the brunt of the nutrient inputs?

A. Yes, that is true. That is why we see the in-shore/offshore differences that people talk about in the literature of the Great Lakes.

Q. With respect to those in-shore/offshore differences, when you talk about the in-shore, is that the zone that first saw the effects in Lake Erie of progressive eutrophication?

A. Yes.

Q. When we use that term in-shore zone for Lake Erie, we are talking about a zone similar to the zone in Lake Michigan?

A. You are talking about the area of the lake closest to the shore. I am not sure if the 40 meter contour holds true there.

Q. When we talk about the in-shore zone which goes around Lake Michigan and we talk about nutrient inputs to the lake, do scientists, in discussing the eutrophication problem, break down Lake Michigan into Illinois' Lake Michigan and Wisconsin's Lake Michigan and Michigan's Lake Michigan and Indiana's Lake Michigan?

A. No, I am afraid we don't.

Q. Is it valid from the scientific perspective, from the standpoint of eutrophication of Lake Michigan, to consider the lake as a series of territorial fifedoms [sic] controlled by individual states?

A. No.

Q. From the standpoint of eutrophication of Lake Michigan, is the problem of nutrient inputs at one location a cumulative problem for the entire lake?

A. Yes. (Dr. Schelske, TR. 2861-63)

Q. The manifestations of blue-green to date that you have studied have manifested themselves in the fall, is that right?

A. Yes.

Q. And they are manifesting themselves now throughout Lake Michigan, this dominance of blue-greens?

A. Yes.

THE COURT: Would that be true in the center of the lake as well as in the coastal zones?

THE WITNESS: Yes. (Dr. Schelske, TR. 2186)

Finding By The Court:

"Accelerated eutrophication results in taste and odor problems in the lake water. In an advanced state, this odor problem can affect the use of the water for recreational purposes, and even in a less advanced stage, it can cause problems with drinking water." (A. 44-45)

Dr. Schelske testified:

Q. And with respect to drinking water, as this eutrophication process goes on, was there any drinking water problems in Lake Erie's experience?

A. We have drinking water problems in Lake Michigan of similar types. The clogging of filter runs. We have to increase the amount of filtering needed to prepare drinking water. Taste and odor problems exist from large standing crops of algae. Some of the phytoplankton give off organic substances that impart a taste or odor to the water that is fishy or smells like dirty clothes. (Dr. Schelske, TR. 2924-25)

Mr. Robert Goodin, Director of Public Works of the Village of Glencoe testified as to just such a taste and odor attack:

Q. Mr. Goodwin, have you had occasion recently within the Village of Glencoe to have a situation where the customers, the public, the citizens who drink from Glencoe's water supply, were subjected to taste and odor problems from the raw water supply?

A. Yes.

Q. Recognizing that a treatment plant operator cannot always anticipate what he is going to receive, in the recent past, have you had situations where the taste and odor problem because of inability to anticipate the problem has actually gone through the water treatment plant and into the distribution system?

A. Yes, we have.

Q. You have had cusomers who have complained about taste and odor?

A. Yes, we did. (Goodin, TR. 13521)

Q. With respect to that, will you state for the Court what this recent episode was in your own words?

A. It was about the—it was the weekend preceding the July 4th weekend that we first got the taste, and our staff then called and found that neighboring towns had the same problem, and we had, I think, within about a week's time—we had about 20 calls that we had recorded at least where people had called about the taste in the water.

Q. These are customers?

A. Customers calling.

Q. Who are drinking water from their taps?

A. Yes. (Goodin, TR. 13525)

Q. So about the fourth or fifth day of this episode, you got to the point where you could get the taste out of the water?

A. Yes.

Q. What did City of Chicago Lab inform you as to the source of this taste and odor problem?

A. They said it was the dinobryon.

Q. The algae dinobryon.

A. Yes. (Goodin, TR. 13530)

Finding By The Court:

"In addition to the odor and taste problems caused by eutrophication, there is a loss of the clarity of the water, which is an aesthetic value important to many people, and I think rightly so. A secchi disc in Lake Superior can be seen at a depth of 60 feet. In Lake Michigan it can be seen at a depth of 10 to 15 feet only. Lake Superior is an ologotrophic [sic] lake. Lake Michigan is becoming a lake which exhibits the turbidity typical of lakes inhabited by increasing populations of algae." (A. 45)

Dr. Schelske testified:

THE COURT: You mentioned that Lake Superior has places where you can see down 60 feet or so. Does Lake Michigan have any such places.

THE WITNESS: In my experience, we have encountered that once at one particular spot in the northern part of the lake, in April or May.

The more typical values in Lake Michigan would be something like 10 feet or 15 feet. (Dr. Schelske, TR. 3009)

Finding By The Court:

"The accelerated eutrophication caused by these nutirient inputs is far greater in the in-shore zone than it is in the off-shore zone, but there is no reason to believe that the eutrophication found in the in-shore zone will not spread, and, if not stopped, that it will not spread clear across the lake." (A. 46)

Dr. Schelske testified:

> Q. How does this nutrient input from the coastal zone get out to the center of the lake?
>
> A. Well, this is a process that is a physical process primarily. The nutrients are introduced into the near-shore zone and are maintained there for some period of time, and eventually by various physical processes in the lake are mixed with the mid-lake waters, and during the wintertime at least we have fairly homogeneous conditions in the lake, when the lake is not thermally stratified, is free to circulate from top to bottom, and we have the highest periods of wind.
>
> Q. So you get your nutrients that you put in over a period of time mixed into the lake, into the lake center, is that right?
>
> A. This is a gradual process.
>
> Q. And with respect to the contribution of phosphorus by Milwaukee, at different periods of the year or throughout the year would Milwaukee's contribution of phosphorus stay at Milwaukee?
>
> A. No. It would be distributed both up and down the coast as well as to some extent out into the middle of the lake, depending on the season of the year. (Dr. Schelske, TR. 2886)

Finding By The Court:

> "In any event, I believe that one million pounds of phosphorus from the treatment plants alone, without considering additional phosphorus discharged by the overflows, is a significant input to the lake, and its removal would be a significant removal. We know that Milwaukee is the biggest point source on the lake and that, of the total point sources on the lake, the Mil-

waukee discharges constitute a substantial percentage." (A. 5-52)

Dr. Schelske testified:

Q. Is there a particular substance or waste product that has a greater proportion of readily available phosphorus than the non-point diffuse source?

A. The source that would have the most readily available phosphorus and the greatest proportion and also the highest concentrations would be sewage.

Q. And with respect to sewage, is there anything else about sewage and its discharges, the discharges of sewage, which enables the phytoplankton to accept the nutrients, to absorb them rapidly?

* * *

A. Yes. Because of the nature of sewage, it is a very good substance to promote growths of organisms that derives from biological materials, various decomposition products. So in essence what sewage is, at least various components of it, is a very rich nutrient broth, if you want to use that term, for biological organisms. So sewage contains a lot of essential materials required for the growth of plants. (Dr. Schelske, TR. 2888-89)

Q. Now, with respect to this, if we were to take this so-called total load on the lake, with respect to the total sewage load on the western side, we have Milwaukee at about 60 percent?

A. Yes.

Q. Total sewage load on the lake about 50 percent?

A. Yes. (Dr. Schelske, TR. 12929)

Q. Doctor, on the basis of your analysis of loads to Lake Michigan, to the western shore of Lake Michi-

gan, would you state what in your opinion is the most significant loading of phosphorus?

A. The most significant source on the western shore is Milwaukee. (Dr. Schelske, TR. 12935-36)

Finding By The Court:

"I find from what I believe is clear and convincing evidence that the defendants' sewage discharges into Lake Michigan are presently contributing in a substantial way to the accelerated eutrophication of the in-shore zone of the western shore of Lake Michigan, including waters of Lake Michigan which are within the territorial boundaries of the State of Illinois.

"I find further, on the basis of clear and convincing evidence, that due to the interchange of waters in the in-shore and off-shore zones, the defendants' discharges, if continued at anything like present levels, will substantially contribute to the accelerated eutrophication of Lake Michigan as a whole, including waters within the territorial boundaries of the States of Illinois and Michigan. (A. 55-56)

Dr. Schelske had testified how the nearshore nutrients moved into the central lake as a whole (see testimony p.94 *supra.*). Dr. Alfred Beeton, Director of the Great Lakes and Marine Water Center at the University of Michigan, has done exhaustive research on the eutrophication of the great lakes, especially Lakes Michigan and Erie. In this work he has performed extensive analyses of eutrophication on the western shore of Lake Michigan. Dr. Beeton testified:

Q. Now, having laid that foundation, based on your experience in Lake Michigan and based on what is coming out of Milwaukee in the form of sewage discharges, are those discharges having an effect on the eutrophication of Illinois waters of Lake Michigan?

A. Well, to answer that I would say that inputs of the magnitude coming out of Milwaukee certainly affect the eutrophication process of the in-shore waters, and from that standpoint I in turn would say that anything that affects the eutrophication of the in-shore waers of the lake also will affect Illinois.

Q. Thank you, Doctor. Why is that?

A. Because there is a movement of water from place to place in the lake, since waters are not static. (Dr. Beeton, TR. 12653-54)

In summary the trial court found that plaintiffs had proved the existence of a nuisance both as to a public health hazard and as to eutrophication. The trial court also found that defendants' actions violated the Illinois Environmental Protection Act.

"For the foregoing reasons, the court finds the issues on the question of liability in favor of the plaintiffs and against the defendants on all three counts of the complaint." (A. 59)

As discussed above the judge's decision is overwhelmingly supported by the record.

III

THE REQUIREMENTS OF JUDGE GRADY'S DECREE AND EVIDENCE IN SUPPORT OF THE DECREE

Judge Grady divided the remedial measures into two major areas:

(1) collection of raw sewage overflows, and

(2) treatment of all sewage flows once collected.

As to raw sewage overflows the court ordered:

"As far as the wet weather flows are concerned, the witnesses for both sides were in agreement that over-

> flows of raw sewage to Lake Michigan cannot be tolerated and must cease. I find that to be the fact. Whether the defendants agree to it or not, the discharge or raw sewage into the lake must cease. (A. 59)
>
> "As far as the method is concerned, I am not going to get into the sanitary engineering business yet, and I hope that I will never have to. From the evidence that I have heard, it seems to me the sensible thing to do is collect, transport, and treat." (A. 60)

As Mr. Dale Lundy of Alvord, Burdick & Howson (Milwaukee's long-term engineering consultant) stated on adverse examination:

> Q. And from a professional engineering standpoint, isn't the safest and least health hazardous alternative to collect and treat such sewage rather than to let it pour into basements or into rivers?
>
> A. That would be considered preferable, yes. (Lundy, TR. 907)

Mr. Donald Weiland, Chief Engineer for the sewage commission, also testified on adverse examination:

> Q. As a design engineer responsible for designing sewers with adequate hydraulic capacity, do you consider it sound sanitary engineering practice to design and install overflow devices which are intended to permit the discharge of raw sewage as a permit solution to hydraulic overloads on an interceptor system?
>
> A. Certainly not. (Weiland, TR. 201)

Turning to the matter of treatment levels which should be achieved at the treatment plants the court found:

> "The effluent standards that should be sought are 5 milligrams per liter of BOD and 5 milligrams per liter of suspended solids." (A. 61)

"I am satisfied from the testimony of Dr. Wellings and other witnesses that unless there is a good removal of solids and a free chlorine residual there is not an adequate kill of viruses." (A. 36)

The evidence to support the need and reasonableness for this performance standard has already been discussed in substantial part in the preceding discussion. However to avoid any doubt about the broad evidentiary support for the judge's order it is set forth here as well.

Dr. Wellings testified:

Our aim in St. Petersburg is to reduce solids to a 5, Jackson, JTD, Jackson Turbidity units, which is less than, I think probably 5 milligrams per liter of solids.

Then that gives you the opportunity to have an effective chlorination. (Dr. Wellings, TR. 12396)

THE COURT: If you have say 5 milligrams per liter of solids, does that help the chlorine remove or kill the viruses associated with those solids more than would be the case if say you had 30 milligrams per liter?

THE WITNESS: Well, the problem with 30 milligrams per liter is you are going to have a lot of organics tied up with solids that is going to use up your chlorine, and the chlorine can't even get into.

THE COURT: I see. So the fewer solids, the less chlorine is used up in other ways.

THE WITNESS: That is right, and that is the reason if you get it down low enough you will have enough active chlorine that can really get to the solids. (Dr. Wellings, TR. 12398)

Q. Doctor, whenever we are finding high solids well, is it your opinion that even at 30 milligrams per liter of solids that we have a problem with disinfection?

A. I think you would still have a problem with disinfection.

I really don't know how I would equate Jackson Turbidity Units with milligrams, you know, because you would have to know size, shape, and all that, source, because of the test itself; but I would say 5 milligrams per liter would be well in the ball park.

* * *

THE COURT: What do you mean by that phrase? Do you mean that would be what you would desire?

A. Well, I wouldn't want anymore than that.

THE COURT: You would not want anymore than that.

THE WITNESS: I would prefer much less, but I wouldn't want anymore than 5.

BY MR. KARAGANIS:

Q. So if we could perform at a maximum of 5 but consistently there would be ones and twos, would that be it?

A. Yes. (Dr. Wellings, TR. 12401-02)

Edwin Geldreich testified:

Q. With respect to the question of BOD, which you indicated interfered with the chlorination process, do you have any opinion as to how low we should get the BOD?

A. As low as possible.

Q. If you could achieve four milligrams per liter BOD through an advanced waste treatment facility, would that be desirable from the standpoint of chlorination?

A. Yes, sir.

Q. With respect to removal of solids, you indicated the solids problem being the encapsulation situation, with respect to effective disinfection through the use of chlorine, do you have any suggestion as to the level that you would want to have for solids?

A. Five milligrams per liter would be desirable.

Q. When you say five milligrams per liter, if that were achievable at an advanced waste treatment facility, would you approve of such a standard?

A. Yes, sir. (Geldreich, TR. 3090-91)

Dr. Berg testified:

Q. So, if we have got fecal material or any other materials surrounding the viruses and you put chlorine on it, will that kill it?

A. The chlorine isn't going to penetrate very far. It is not going to kill embedded virus.

Q. Would it be fair to say that in order to have effective chlorination of the material that you are chlorinating, you should remove the solids?

A. That is correct.

Q. With respect to the organics, do you also try and remove the organics?

A. Yes. You would want to do that in order to prevent or reduce the formation of the compounds that are less effective. (Dr. Berg, TR. 12068)

Berg testified that plant effluents of 50 or 100 mg/1 BOD or suspended solids—which defendants admit they could

discharge on any day and still meet their desired average[24] —would have no virus removal. (TR. 12118-20)

Gordon Culp testified as to the desirability of coagulation/sedimentation followed by filtration:

> Q. When you talk about coagulation and setting combined with filtration, you get a very stable, very uniform, very low concentration of contaminants in the effluent, is that right?
>
> A. That is right. It is very consistent. You are no longer dependent on the gravity separation, only of a very light flocculent biologic material, biologic material which can vary in its setting capabilities from day to day. Now you have very positive control with the solids.
>
> Q. Let me just ask this.
>
> You were a trained engineer dealing with an activated sludge plant—were you very conscientious about its performance?
>
> A. Yes.
>
> Q. You wanted it to do the best job it could, isn't that right?
>
> A. Yes.

---

[24] Defendants' witness Katz admitted:

> Q. Just for example's sake, if I were to take a discharge of 100 milligrams of BOD from the Jones Island treatment plant, based on this permit you could have and still meet your 30 days and still meet your seven days, you could have discharges of 100, can't you?
>
> A. And still meet the monthly——
>
> Q. Yes.
>
> A. —or weekly——
>
> Q. Yes.
>
> A. —average, yes.

> Q. Now despite your trained engineering supervision of that plant, were you able to get a consistently low solid and BOD out of the activated sludge plant?
>
> A. No.
>
> Q. Are the upsets in an activated sludge plant something that you can predict? Can you sit back and say, "We are going to have a bad day tomorrow?"
>
> A. No, you certainly cannot. There are some conditions, of course, which will occur which will allow you to predict that, but the normal operation, no. (Culp, TR. 13006-07)

Culp did a calculation of the cost of coagulation/sedimentation and filtration and testified that the average homeowner would pay less than $2 a month for the total capital cost and operating cost of the facilities even without federal grants.[25]

This is exactly the same treatment recommended by defendants' own engineering consultant—Alvord, Burdick & Howson. They recommended coagulation/sedimentation plus filtration (TR. 753-54; Plaintiffs' Exhibit 91). In 1976 Alvord, Burdick & Howson wrote a letter to their client, the defendant Sewerage Commission stating:

> Effluent requirements are continually becoming more stringent. For illustration, Waukesha has just been advised that its *effluent must meet BOD of 4, and S.S. of 5 ppm.* If EPA stays in existence, *I think the time is not far distant when effluents discharged to the Great Lakes will have requirements of that order.* We

---

[25] Milwaukee's own fiscal witness Heaps estimated that the average cost per household to finance Milwaukee's entire program—sewers included—would cost less than an average of $6 per month per household without any federal aid. (Defendants' Exhibit 1348, Item 13).

> are just now finishing a very complete, sophisticated plant at Roanoke, Va., which has requirements that are *even more rigid than those above mentioned.* (Plaintiffs' Exhibit 74, emphasis added)

Alvord, Burdick's letter was correct. Hammond, East Chicago, and Gary, Indiana are being required to install filters with discharge requirements identical to Judge Grady's 5 mg/1 solids and 5 mg/1 BOD. (Plaintiffs' Exhibit 273.) Cities such as Washington, D.C., Chicago, and Dallas are also adding filtration facilities to their activated sludge plants. (TR. 13002-04)

CONCLUSION

This memorandum has only scratched the surface of a mountain of evidence mandating judicial relief against defendants' massive fecal discharges. The sheer vastness of this record prohibits further elaboration at this time. Plaintiff again respectfully draws necessary attention to the "clearly erroneous" standard of Rule 52. *See, Barnes* v. *St. Catherine's Hospital,* 563 F.2d 324, 329 (7th Cir. 1977); *Indiana State Employees' Ass'n, Inc.* v. *Negley,* 501 F.2d 1239, 1241-42 (7th Cir. 1974).

But more important than any procedural question are two fundamental questions of fact and law:

> 1) Will this Court condone the continual corruption of Lake Michigan by letting Milwaukee use the lake as its cesspool?
>
> 2) Will this Court honor the centuries old utility of public nuisance as an effective tool for the protection of the public health and welfare?

The peril or protection of generations dependent on Lake Michigan for their physical and aesthetic sustenance will turn on this Court's answers to these questions. Plaintiff State of Illinois respectfully urges this Court to clearly and aggressively affirm the District Court's decision and judgment order.

Respectfully submitted,

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Joint Memorandum of Defendants-Appellants City of Milwaukee, The Sewerage Commission of the City of Milwaukee and The Metropolitan Sewerage Commission of the County of Milwaukee to the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 77-2246

PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff-Appellee,*

and

PEOPLE OF THE STATE OF MICHIGAN,
Intervening Plaintiff-Appellee,

vs.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Defendants-Appellants.

Appeal of the United States District Court for the Northern District of Illinois, Eastern Division
Honorable John F. Grady, Presiding

JOINT MEMORANDUM OF DEFENDANTS-APPELLANTS CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE

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INTRODUCTION

This memorandum responds to the supplemental memorandum filed by plaintiff-appellee State of Illinois pursuant to this Court's order of May 26, 1978.[1] The May 26 order stated:

> "[T]he appellees are directed within thirty (30) days from the date of this order to serve and file a memorandum setting forth (1) their position as to the elements required to be proved [to establish a nuisance under the federal common law]; (2) the transcript of Judge Grady's oral decision, identifying therein the particularized findings deemed material to such issues, and supplying by footnotes to said transcript record citations of evidence which appellees contend supports such findings; and (3) record citations to evidence which appellees contend supports the reasonableness and necessity of the standards adopted in a final decree."

We do not understand the May 26 order to permit either party to brief its case again. For that reason, we have not responded in full to the legal argument included in the supplemental memorandum submitted by Illinois and we specifically rely on the briefs previously filed herein by defendants. Instead, this memorandum delineates the elements which must be proved to establish a federal common law nuisance (Part I); describes where and if the lower court found those elements, and describes where and if the record below supports those elements found by the lower court (Part II); and describes the boundaries of relief which may be granted (Part III).

In responding to Illinois' supplemental memorandum, we mention by way of introduction a number of points

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[1] Intervening plaintiff-appellee State of Michigan simply supports the memorandum filed by Illinois.

which Illinois has either incorrectly analyzed or failed to consider altogether.

First, the supplemental memorandum *nowhere* even mentions—much less discusses—the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251 *et seq.* ("FWPCA"), or the administrative regulations and discharge permits issued pursuant thereto, even though federal case law is clear that relevant federal statutes and regulations are the first and principal place to which federal courts refer when seeking to determine applicable federal common law. Instead, Illinois incorrectly asserts that (i) *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972), simply directed the lower court to exercise "informed judgment" (Supp. Memo. pp. 8, 24), and (ii) the Supreme Court has adopted the common law of England and of the various states as the federal common law (Supp. Memo. pp. 9-13). Illinois' unjustified disregard of existing federal statutory and regulatory law reflects the incorrect legal reasoning underlying the lower court's decision. Illinois and the court below have chosen to ignore the principle adopted by the Supreme Court that: "If there is a federal statute dealing with the general subject, it is the prime repository of federal policy and a starting point for federal common law." *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 69 (1966).

Second, the supplemental memorandum fails to identify and address each evidentiary element needed to prove a public nuisance under federal common law. Much attention is paid to the character of defendants' discharges into Lake Michigan at Milwaukee; somewhat less attention is paid to the potential transport of such discharges into Illinois waters and the possible contents and condition of such discharges when, if ever, they arrive in Illinois waters; but absolutely no evidence is cited which establishes a necessary proximity to Illinois water intakes or to Illinois beaches of pathogens which move to Illinois waters from

Milwaukee, if any, and no evidence is cited which shows that there is any actual effect on people in Illinois (which effect would result if the cause or hazard were present). Note that defendants do not argue that an effect must be shown *if a hazard is proved;* the position is that the absence of effect negates and *disproves the existence* of any hazard. This void of evidence is critical since no health hazard can exist unless pathogens are transported close enough to the Illinois shore to be ingested by swimmers or drawn into the intake of an Illinois water treatment plant.

Third, it is evident from Illinois' supplemental memorandum itself that there is no evidence to support the reasonableness and necessity of the standards ordered by the lower court. The "evidence" said to support the standards ordered by the lower court is nothing more than generalized guesstimates of treatment levels which would be "desirable" as a general matter. These guesstimates were given by people who are not sanitary engineers and know nothing about the site-specific Milwaukee-Illinois situation, and were given without *any* particularized consideration of the relative benefits and disadvantages of alternative treatment levels, or the relative costs of such treatment levels.

Fourth, the failure of proof in this case is due not only to specific and crucial gaps in the chain of circumstances which must be proved to establish a federal common law nuisance, but also to Illinois' studied reliance upon speculation after speculation even though hard evidence could and should have been adduced if the nuisance claimed by Illinois were actually present. Illinois (i) did not test for the presence, much less the behavior and life span, of viruses *anywhere* in Lake Michigan, (ii) did not test for bacteria *anywhere* in Lake Michigan (except to determine whether Illinois beaches should be closed, and those tests have proved essentially negative since Illinois' *own* north shore point sources stopped discharging into the lake),

(iii) did not test for *any* health impacts which might be associated with swimming in or drinking water from Lake Michigan, (iv) did not conduct *any* test for viral and bacterial inactivation achieved by water treatment plants in Illinois, and (v) offered *no* evidence as to the reasonableness and necessity of imposing upon defendants a 5/5 standard 25 miles away at Milwaukee rather than the 30/30 standard prescribed by defendants' discharge permits. Instead, Illinois has deliberately chosen to rely upon a series of speculations about the actual facts, even though the true actual facts could and should have been established by hard evidence. As discussed below, without such evidence, no federal common law can be established.

A final important introductory comment is that contrary to Illinois' basic position, the general common law rule is that what is authorized by statute or license cannot be a *public* nuisance, although such license does not necessarily preclude liability for *private* nuisance. 58 AmJur.2d *Nuisances* §§ 228-229; *Commerce Oil Refining Corp.* v. *Miner*, 281 F.2d 465, 468 (1st Cir.), *cert. denied*, 364 U.S. 910 (1960); *Urie* v. *Franconia Paper Corp.*, 107 N.H. 131, 218 A.2d 360, 362 (1966); *First National Bank in Albuquerque* v. *Nor-Am Agricultural Products, Inc.*, 88 N.M. 74, 537 P.2d 682, 686-87 (1975) (as insecticide was manufactured pursuant to authority granted by the federal government, its manufacture does not constitute a nuisance); *Commonwealth* v. *Glen Alden Corp.*, 418 Pa. 57, 210 A.2d 256 (1965) (court could not entertain common law public nuisance suit claiming that noxious fumes were injuring the health and well being of state's residents, where Air Pollution Control Act was designed to regulate this very problem); *Borough of Westville* v. *Whitney Home Builders, Inc.*, 32 N.J. Super. 538, 108 A.2d 660, 663 (1954), *aff'd*, 40 N.J. Super. 62, 122 A.2d 233 (App.Div. 1956) (discharges from sewage disposal plant could not constitute public nuisance where discharges were approved by State Department of Health pursuant to legislative authority); *Boccardo* v. *United*

States, 341 F.Supp. 858, 865 (N.D. Cal. 1972); *Township of Cherry Hill* v. *New Jersey Racing Commission,* 131 N.J. Super. 125, 328 A.2d 653, 664, *aff'd,* 131 N.J. Super. 482, 330 A.2d 600 (App.Div. 1974), *cert. denied,* 68 N.J. 135, 343 A.2d 423 (1975).

This is the rule in Illinois, *People ex rel. Scott* v. *Continental Can Company, Inc.,* 28 Ill.App. 3d 1004, 329 N.E.2d 362 (1975) (summary judgment for defendant in suit by Attorney General to enjoin air pollution and alleged public nuisance, since defendant had a permit and was in compliance with emission limitations imposed by statute and Pollution Control Board),[2] and is the federal common law rule. *Potomac River Association, Inc.* v. *Lundeberg Maryland Seamanship School, Inc.,* 402 F.Supp. 344, 359 (D. Md. 1975) (Corps of Engineers permits authorizing dredging and filling foreclose recovery for public or private nuisance for injuries occurring from activities under the permits); *Northern Transportation Co.* v. *City of Chicago,* 99 U.S. 635, 640 (1879):

> "A Legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which without the authority would be nuisances; but in such a case, if the statute be such as the Legislature has power to pass, the acts are lawful and are not nuisances, unless the power has been exceeded."

Committee for Consideration of Jones Falls Sewage System v. *Train,* 539 F.2d 1006, 1009 (4th Cir. 1976) (states in strong language that federal common law cannot proscribe

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[2] *Costas* v. *City of Fond du Lac,* 24 Wis.2d 409, 129 N.W.2d 217 (1964) (Ill. Supp. Mem. p. 18) involved a private nuisance action. *People ex rel. Scott* v. *United States Steel Corp.,* 40 Ill.App. 3d 607, 352 N.E.2d 225 (1976) (Ill. Supp. Mem. p. 19) did not address the question. The question there was whether the primary jurisdiction and exhaustion doctrines precluded a nuisance suit during the pendency of an EPA NPDES hearing.

that which the 1972 FWPCA amendments legitimate); *City of Georgetown* v. *The Alexandria Canal Company*, 37 U.S. 91, 97 (1838); *Cf., Sanitary District of Chicago* v. *United States*, 266 U.S. 405, 432 (1925) (injunction against diversion of Lake Michigan granted, without prejudice to any permit that may be issued by the Secretary of War according to law).

I. FACTORS WHICH MUST BE PROVED TO ESTABLISH A FEDERAL COMMON LAW NUISANCE

First, the *federal* law which governs federal common law nuisances must be identified. The starting point is the *Erie* doctrine that there is no body of generally applicable federal common law. Thus, since this case is governed by the *federal* common law, *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972), it must of necessity fall within one of the exception areas in which *federal* common law may exist, i.e., for the purposes of this case, the *federal* common law must be supplying interstices in federal statutory and regulatory law or it must be supplying a uniform federal court-promulgated rule where there is an absence of statutory or regulatory law. *Id.* at 103-105 n. 5-7.

It is therefore necessary to start with the federal statutory and regulatory scheme. If that be complete, there is no office for the *federal* common law to perform except to interpret and apply the federal statutory and regulatory law. If the statutory and regulatory law is not complete then the federal courts may also supply the missing elements and then interpret and apply the statutory and regulatory scheme as augmented.

We have previously briefed our contention that the federal statutory provisions and the permit system established and operated thereunder establish the parameters to which effluent discharges must conform and which define the requirements which *federal* common law may impose.

In essence, we stated the following propositions. There is no question but that *federal* statutory and regulatory law exists governing effluents that are discharged to interstate waters. There is no question but that this case deals with effluent discharges into interstate waters. Thus, we looked to the statutory and regulatory federal law to determine what controls are imposed upon dsicharges of effluent to interstate water and then to federal court interpretations thereof and federal court determinations supplying interstices therein or, where they fail to reach an area, supplying missing areas of control. On that basis we postulated the proposition that our permits controlled our effluents and the federal judiciary was limited thereby in framing a remedy here. OF COURSE, AN *administrative* AVENUE IS OPEN TO PLAINTIFFS TO CHANGE THOSE PARAMETERS BY INTERVENING IN THE PERMIT PROCEEDINGS, BUT PLAINTIFFS HAVE CHOSEN TO PROCEED UNDER THE FEDERAL COMMON LAW WHICH ACCEPTS THOSE PERMIT PARAMETERS AND IS LIMITED THEREBY.

However, to meet the Court's Order, we here address the delineation of the elements of a "federal common law nuisance" by assuming *arguendo* that the federal statute and the permits issued thereunder do not so define both the required conduct and the *federal* common law remedy. However, even in such an approach the important impact of the adoption of the federal statute after the Supreme Court had decided the lead cases involving interstate water pollution is clear. As noted previously, "If there is a federal statute dealing with the general subject, it is the prime repository of federal policy and a starting point for federal common law." *Wallis* v. *Pan American Petroleum Corp., supra* at 69. This is what Judge Tone referred to as "the doctrine of the common law of the statute" at oral argument.

Federal courts, in promulgating federal common law, are bound under the doctrine of *stare decisis* by the decisions of the appellate courts in the *federal* system which exercise appellate jurisdiction over them. They are not bound by,

but may look to, the decisions of courts in the federal system which do not exercise appellate jurisdiction over them and they may likewise look to the decisions and rules of state law, though they are again not bound thereby.

We see no basis in a federal common law nuisance case for departing from the fact that traditionally, and as a fundamental requirement, the first inquiry a federal court makes is directed to its jurisdiction. Two challenges appear in the record before this Court to its jurisdiction. The first was decided by Judge Bauer in *Illinois* v. *Milwaukee,* 4 E.R.C. 1849 (N.D. Ill. 1972) (and preserved for this appeal) wherein he held (against contentions that the venue locus of a nuisance action is the place of perpetration rather than the place of result, and that municipal corporations such as the defendants are legally incapable of existing or being subject to process outside their own geographical limits) that the U.S. District Court in Illinois not only was a proper venue for the trial of a nuisance action involving a nuisance whose alleged perpetration is clearly outside Illinois, but that the municipal corporation defendants, all creatures of the sovereign state of Wisconsin, were susceptible to service of process by that court. The second jurisdictional challenge is that of the County of Milwaukee which asserts in this Court that it was a necessary and indispensible party not joined below. While we believe these are necessary points for plaintiffs to surpass in order to sustain jurisdiction and venue for the holding below, we will not dwell on them but will proceed directly to the delineation of the substantive elements of a federal common law nuisance, as we mentioned, assuming *arguendo* that the federal statutes and regulations are not totally controlling.

There are few cases which define a federal common law nuisance. Fortunately, such cases predominate in the precise area of our concern, namely interstate waters and possible health hazards. We believe that the only relevant line of cases binding on this Court is that referred to by

Justice Douglas in *Illinois* v. *Milwaukee, supra,* including *Missouri* v. *Illinois,* 200 U.S. 496 (1905); *Missouri* v. *Illinois,* 180 U.S. 208 (1901); *New York* v. *New Jersey,* 256 U.S. 296 (1921); and *North Dakota* v. *Minnesota,* 263 U.S. 344 (1923).

These Supreme Court cases stand for some general propositions which in turn contain the elements of a federal common law nuisance. These cases say that a federal common law nuisance has two elements:

1. The existence of a right, and
2. The substantial unjustified interference with that right.

In addition, these cases make it plain that proof of these requisite elements may not depend upon the speculations of experts; instead, such proof must be clear and convincing.

In terms of the nuisance alleged here, and the facts in evidence, the federal common law as established by the Supreme Court of the United States in the cited cases is clear and may be outlined as follows.

A. A Right Must Be Shown To Exist In The Plaintiff.

1. Plaintiff Illinois asserts a right to freedom from exposure to a health hazard.
2. Both plaintiff states assert a right to be free from accelerated eutrophication.

In respect to the health hazard claim, the cases of *Missouri* v. *Illinois* and *New York* v. *New Jersey* certainly have an inherent assumption that such a right exists and defendants do not challenge the existence of such a right. However, the right is not absolute in the sense that it can be merely asserted and relief follows as of course. The claimed interference with the right must also be shown.

B. A Substantial Unjustified Interference With An Established Right Must Be Shown.

1. Mere deposit of effluent into interstate water is not sufficient, *Missouri* v. *Illinois, supra; New York* v. *New Jersey, supra.*

    a. The test for effects of health hazard is at the site where the complaint is made, *id.*

        (i) This means showing

            (a) deposit in water of pathogens

            (b) transport of pathogens

            (c) existence of pathogens at site of complaint

            (d) effect of pathogens

                (I) exposure

                (II) infection

In *Missouri* v. *Illinois,* 200 U.S. 496 (1905), Missouri sought to restrain Chicago's discharge of sewage into the Des Plaines River, which emptied into the Illinois River and thence into the Mississippi River 43 miles above St. Louis. Missouri claimed, *inter alia,* that Chicago's sewage discharges so poisoned the Mississippi River as to make it unfit for drinking, agricultural or manufacturing purposes.

Missouri's chief contention was that St. Louis had experienced an increase in typhoid fever deaths (which it had), and that typhoid bacillus contained in Chicago's sewage discharges survived the journey from Chicago to the St. Louis water intake. There was conflicting expert testimony as to the time and distance within which the stream would purify itself. Comparing the number of deaths in St. Louis before the operation of the Illinois system to that after, the Supreme Court concluded that the grounds for an inference of harm were very narrow since there had been no increased rate of typhoid along the banks of the Illinois

River. The Court (i) concluded that it was uncertain how much pollution was due to Chicago and how much to sources further down river not complained of by plaintiff, (ii) noted that plaintiff had to take preventative measures at St. Louis (filtration, etc.), against the dangers of plaintiff's own creation (or from sources other than Illinois), (iii) determined that such preventative measures would protect against Illinois sources as well as those not complained of, and (iv) denied injunctive relief.[3]

The factors relevant to ordinary injunction analysis also are relevant to the balancing of equities required for purposes of imposing a remedy.

Certainly, the above propositions delineating the approach to a nuisance claim based on an asserted health hazard are even more applicable to the somewhat nebulous

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[3] *Reserve Mining Co.* v. *EPA*, 514 F.2d 492 (8th Cir. 1975), discussed at some length in the Illinois memo is not in point for purposes of traditional common law analysis. The court expressly noted n. 71, p. 529) that it was not there concerned with nonstatutory common law doctrines, and that most common law nuisance cases involving alleged harmful health effects require that present harm or an immediate threat of harm be established, citing, *e.g.*, *Missouri* v. *Illinois*. Note that in *Reserve Mining* the court dealt with asbestos fibers in drinking water. Asbestos fibers were a suspected carcinogen, the effect of these fibers would not be known for a number of years and was likely to be catastrophic both in number of people affected and in the type of effect, cancer. Here we have an alleged hazard, involving known diseases with short incubation periods, which hasn't occurred in a century of alleged exposure. The cases are wholly different. In the first an unknown exposure against which no protection existed was presented. Here the enteroviral and bacterial diseases that Illinois conjectures to be possibly present are subject to fail-safe and time honored protection in the form of chlorinating *drinking* water, the principal concern of the case, and closing breaches if pollution is detected, a measure which has not been necessary since Illinois stopped its own north shore discharges. Def. Ex. 1383 and 1384) In *Reserve Mining* the court had to fashion a remedy, here sanitary engineers have been providing an adequate, effective, and usual solution for years.

proposition of a right to be free from accelerated eutrophication "occurring over geologic time." (A-Ap. p. 49)

Illinois law is consistent with the above approach. In *City of Chicago* v. *Commonwealth Edison Co.*, 24 Ill. App. 3d 624, 321 N.E.2d 412 (1974), Chicago sought to enjoin the operation of Edison's Hammond, Indiana electric generating facility, alleging that the emissions from the company's stacks (sulphur dioxide, smoke, particulate matter, dust, fumes and other gases) constituted a nuisance under Illinois common law.[4] The appellate court affirmed the trial court's conclusion that the evidence did not establish a common law nuisance. The court noted that equitable relief usually is denied where the right to relief is doubtful under the law or facts, and that injunctive relief will be denied unless substantial harm or injury is clearly demonstrated. The court held that the city had failed to answer the threshold question of whether the Indiana facility caused "substantial harm" since, among other things [5] (i) plaintiff's evidence as to ground level concentrations of sulphur dioxide and particulate matter was not expressed in terms of time, so as to be compared with federal standards, (ii) defendant offered credible testimony demonstrating that its Indiana facility's contributions to sulphur dioxide and par-

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[4] Interestingly, the trial court held that Chicago could not seek to impose its emissions ordinances with respect to the Indiana facility. This holding apparently was not appealed.

[5] The court noted that early cases recognized a public right to clean, unpolluted air, but that the notion of "pure" air has come to mean clean air consistent with the locality and circumstances. Factors relevant in determining whether an industrial operation is an unreasonable interference with the right to clean air are: (1) the extent of injury or harm to the public health, safety, peace and comfort; (2) comparison of the operations methods or effects to prescribed standards outlined by applicable federal, state or local regulations; (3) suitability of the industry's location; (4) balancing of gravity of the harm done to the public against the utility of the defendant's business to the community as a whole.

ticulate matter ground level concentrations were below the levels proscribed by federal regulations, and (iii) the city could not clearly establish that the Edison plant was the direct cause of harmful pollution in Chicago—i.e., could not distinguish emissions from that facility from those of other sources located in the area.

In the case before this Court, as detailed in Part II *infra*, the evidence not only fails to show a substantial unjustified interference with Illinois' right to be free from a health hazard, it fails to show *any* interference and it fails to show a health hazard. The evidence on this element, or the lack thereof, may be outlined as follows (citations are provided in Part II, *infra*):

A. No tests for viruses in Lake Michigan were made.

(i) None were made at Milwaukee

(ii) None were made in Illinois waters

(iii) Viruses can be tested for and found

B. No tests for bacterial pathogens were made in Lake Michigan.

(i) None were made at Milwaukee

(ii) None were made at Illinois

(iii) Bacterial pathogens can be tested for and found

(iv) Tests for fecal coliform were run by defendants

(a) No high counts in Illinois

(b) Come from sources other than humans

C. No Illinois beaches have been closed since the north shore point sources *in Illinois* stopped discharging to Lake Michigan.

(i) Milwaukee discharged both before and after the north shore point sources *in Illinois* stopped discharging to Lake Michigan.

D. No outbreak of water borne disease or infection has been shown in Illinois.

(i) Such diseases are known

(ii) Such diseases have short incubation periods

(iii) Test programs could have been, but were not, utilized by plaintiff to determine existence.

E. Proof of *pathogen* transport was not addressed.

(i) No viruses were shown *anywhere* in Lake Michigan. There was merely an assumption that some of the viruses that are known to exist in human waste get into Lake Michigan in Milwaukee's discharges.

(ii) No bacterial pathogens were shown *anywhere* in the lake. There was merely an assumption that some of the bacterial pathogens that are known to exist in human waste get into Lake Michigan in Milwaukee's discharges.

(iii) The *only* direct evidence relied on by plaintiff to show actual presence of pathogens in Illinois waters is *low* fecal coliform counts on Illinois beaches.

(iv) Principal reliance as to transport was upon expert opinions that postulated currents of sufficient speed and duration to transport *water* and "*pollutants*" from Milwaukee to Illinois.

(a) The distinction in the testimony between conservative and non-conservative pollutants was disregarded by the court below

(b) Non-conservative pollutants (pathogens) are subject to

(I) Die off

(II) Predation

(III) Sedimentation

(IV) Dilution

(V) Ultra violet radiation

(c) No witness testified that pathogens *could be* or *were* transported from Milwaukee to Illinois, surviving *all* of the *above* impediments to transport.

II. THE LOWER COURT'S FINDINGS AND THE SUPPORT, OR LACK THEREOF, IN THE RECORD FOR SUCH FINDINGS

A. Transport

At pages 56-60 of its supplemental memorandum, Illinois has identified the following excerpt from the lower court's oral decision as a finding that viable pathogens are occasionally transported from Milwaukee to Illinois waters:

> "These pathogens, once they are discharged to the lake, are on occasion transported by the currents to the waters of the State of Illinois. We know this for several reasons. First of all, both sides concede that on a number of occasions throughout the year, there are currents of sufficient speed to transport from the Milwaukee area pathogens which will still be alive when they reach the Illinois state line." (A-Ap. p. 28)

1. *The Lower Court Did Not Distinguish—As It Should Have—Between Conservative and Nonconservative Pollutants.*

Unlike the trial court, and unlike Illinois in its brief and supplemental memorandum, the witnesses were careful during trial to distinguish between "conservative" and "nonconservative" pollutants and the difference in the way they behave and persist in a body of water.

Defendants' witness—Dr. Zanoni

"A. A conservative pollutant is a very general way of describing a class of pollutants that would be discharged in the receiving water. It merely means this, that they tend to conserve themselves and remain unchanged after discharge.

A good example of a conservative pollutant would be a simple salt, sodium chloride or calcium sulfate, the type of material you would find commonly in storm water runoff. This material virtually comes into the lake or river or any receiving body of water and is unrelated with time.

The only way that this material is removed or can be taken out of a particular body of water is by currents or some type of flow out of the body of water that is a conservative pollutant.

In contrast to this is what we refer to as a nonconservative pollutant. The nonconservative pollutant is a type of pollutant that changes or is altered or degrades with time or dies off with time or tends to disappear with time. It is a changing type of pollutant.

* * *

Another example of a nonconservative pollutant is something like fecal coliform organisms. Fecal coliform organisms are normally not indigenous to the aquatic environment, like a lake. If they are introduced into the aquatic environment, they change with time, meaning they die off or they disappear or they actually undergo what is called a process of extinction, they die off with time.

That is nonconservative. They are not conserved. The environment causes a change." (Tr. p. 3980-3981)

Mr. Harry Carter explained why one may not equate the behavior or persistence of conservative pollutants (like dye

used to track currents) with the behavior or persistence of nonconservative pollutants (like pathogens).

> "The concentration of dye and the concentration of coliforms are reduced by several processes. Both of them are subject to dilution by diffusion.
>
> In addition, the coliforms are subject to additional factors which cause their disappearance, let's say.
>
> Sometimes they settle out—sedimentation.
>
> Sometimes they are eaten by another organism.
>
> Sometimes there are not enough nutrients in the water to support them.
>
> But over and above any decrease in concentration due to dilution, there is an additional disappearance which is termed the die-away rate or disappearance rate." (Tr. pp. 8586-8587)

In contrast to nonconservative pollutants, which are subject to many factors, conservative pollutants are subject only to dilution. Plaintiff's witness Dr. Gabriel Csanady explained:

> "Most tracers and many pollutants retain their chemical identity in the lake environment for long periods: Such substances are called conservative, because their total mass remains conserved, whatever its distribution over the lake's horizontal and vertical dimensions. When a quantity of conservative substance is introduced into the lake it gradually spreads over a larger and larger region. Because its mass is conserved, the substance's concentration at the center of the cloud must decrease in time; the cloud must become more and more diluted." (Pl.Ex. 20, p. 107)

The distinction between conservative and nonconservative pollutants is crucial if one is to avoid confusing the

question of the transport of water with the transport of materials which are subject to environmental factors other than dilution. The lower court failed to avoid such confusion; the supplemental memorandum filed by Illinois encourages this Court to continue that confusion.

Illinois has repeatedly so used a quote from defendant's expert witness, Dr. Pritchard, that this distinction is lost. Illinois used the quote at pages 15 and 24 of its original brief. It was also used at page 60 of Illinois' supplemental memorandum. At page 15 of the Illinois brief the quote was used to argue that "pathogens" discharged at Milwaukee would move to Illinois waters. This is the quote upon which Illinois relies:

> "Q. There is no question that everything you have seen indicates that a substance which is placed at Milwaukee will reach Illinois waters, isn't that right?"
>
> "A. Correct, at some frequency." (Tr. p. 7175)

However, a review of the transcript immediately preceding the quotation shows that Dr. Pritchard was specifically limited by Illinois to considering only conservative pollutants, viz:

> "By Mr. Karaganis: Q. Doctor, just briefly if we have a substance that is one that we are concerned not with concentration but with total pounds, okay?"
>
> "A. Right." (*Id.*)

It is this limitation that is immediately followed by the quoted question and answer, viz:

> "Q. There is no question that everything you have seen indicates that a substance which is placed at Milwaukee will reach Illinois waters, isn't that correct.
>
> A. Correct, at some frequency." (*Id.*)

When Illinois' attorney repeats the answer as a question, Dr. Pritchard immediately responds with the four instances he had found that *water* parcels go to Illinois in single-phase excursions, viz:

> "Q. At some frequency.
>
> A. And our data to date is four instances during the year that we——" (Tr. p. 7176)

Illinois' attorney then changes the inquiry to include multiple excursions of water, viz:

> "Q. No, doctor, I am sorry. As to the four instances, your [Def. Ex. 905] data is a single phase excursion. That doesn't include data in which there was a reversal and then the water moved back down again, isn't that right?
>
> A. That is right, and that kind of look at the data is certainly pertinent." (*Id.*)

At this point, Dr. Pritchard attempts to introduce the concept of non-conservative pollutants, viz:

> "Q. Thank you, doctor, and you haven't made that kind of a look at the data?
>
> A. No, and the reason we didn't is because we began adding days and die off becomes more and more important." (*Id.*)

Illinois' attorney immediately requires Dr. Pritchard to stay on the subject of *conservative* pollutants, viz:

> "Q. But die off with a pollutant, where we are talking about pound loads that doesn't die off——
>
> A. Right, not if we are talking about something other than things like coliform, something that was conservative. Then it would be desirable to do the kind of——" (*Id.*)

* * *

Illinois' attorney then clarifies the fact that the subject of this line of questions and answers is *conservative pollutants,* viz:

> "Q. Doctor, with respect to a pollutant which isn't going to degrade, the time at which that pollutant or the number of times, the number of excursions, that that pollutant would come down under your experiments now would be greater than four times, isn't that right?
>
> A. I would presume so, yes, sir." (Tr. p. 7177)

When Illinois specifically limits a question to pound loadings i.e., conservative pollutants, it is not in position to cite the question and answer as dealing with non-conservative pollutants, to wit, pathogens.

During the trial, witnesses and attorneys would often use the term "pollutants" with the context determining the type of pollutant being discussed. Thus, in many instances in which the term "pollutants" was used, whether they were talking about conservative or nonconservative pollutants is defined by the context. As a result of that practice, great care has to be used in interpreting portions of the transcript or exhibits in the record, lest the term "pollutant" be automatically associated with the concept of a pathogen, be it bacterial or viral.

This identification problem was illustrated at oral argument during an exchange between Judge Tone and Mr. Elwin Zarwell, appellants' attorney. Judge Tone asked whether appellants are not being "overly broad" to claim that there is no direct evidence or testimonial opinion in the record which indicates that viable pathogens are or can be transported from Milwaukee to Illinois waters, taking into account all of the factors in Lake Michigan adverse to pathogens. Judge Tone referred to Dr. Csanady's "testimony" in plaintiff's exhibit 20, twice cited by Illinois to the effect that pollutants introduced in the inshore zone have

an influence zone of the order of 100 km. along the shore in either direction (Ill. Supp. memo. p. 58; Ill. brief p. 15). In his question Judge Tone appeared to use the term "pollutants" interchangeably with the term "pathogens". Dr. Csanady, however, used the term pollutants in Plaintiff's Exhibit 20 only in the sense of *conservative* pollutants, as a review of that document shows. For example, the process by which a 100 km. "influence zone" is said to occur is explained:

> "The local concentration of a conservative pollutant in Lake Michigan depends on the rate at which some discharged batch mixes with ambient waters and thereby expands in size." (Pl. Ex. 20 p. 103)

> "In view of the intimate connection between flux and dilution, it is more or less equivalent to refer to diffusion as 'cloud growth,' 'spreading out of a tracer,' 'dilution of a pollutant,' 'mixing of a substance with ambient fluid,' or 'entrainment of ambient fluid into a tracer cloud.'" (*Id.* p. 107)

Illinois' use of the quote from Csanady in its original brief under the section entitled TRANSPORT OF PATHOGENS TO ILLINOIS WATERS fails to reflect the expert's distinction between conservative and non-conservative pollutants, and, we believe, gives rise to confusion on the issue of transport of pathogens.

Like Illinois' submissions to this Court, the trial court's oral decision failed to distinguish between conservative pollutants and such nonconservative pollutants as pathogens.

> "First of all, both sides concede that on a number of occasions throughout the year, there are currents of sufficient persistence in a southerly direction and of a sufficient speed to transport from the Milwaukee area pathogens which will still be alive when they reach the state line." (A-Ap. p. 28)

No such concession occurred. In fact, defendant City of Milwaukee's attorney, Michael McCabe, stated during closing argument:

> "Now, no one has presented us with a model that tells us not only how or what in that model dilutes, but no one has shown us a model of what happens, let's say to the bacteria once they get into the lake; and bacteria do not maintain themselves in water in the same manner as water does. To the extent that they are attached to solids, solids will settle. To the extent that they are attached to organic material, and I think almost by definition they are attached to organic material as fecal material is to [sic] organic material, and any attachment that they develop in the secondary aeration basins is also organic material.
>
> To the extent that they are attached to organic material they are food. They are food to zooplanton in the water column. They are food to macro-benthic organisms on the bottom. They are food to macro-benthic organisms such as pontoporia that move up and down in the water column although they are basically located at the bottom. They are also food to small fish which take in organic material. Now, no one has attempted to model what is going to happen between the point where they are discharged into the river or into the lake from the plants. They have told us what gets into the lake, and they have told us what will happen in terms of die off, that is, death as a function of temperature. We have also not been told in any, I think, scientifically respectable manner how many bacteria in fact are in a plume that leaves the harbor." (Tr. pp. 13991-13992)
>
> * * *
>
> "Of course that is diluted into the river and settled out in the river to a certain extent, settled out in the harbor, settles out in the lake. It is also impacted by

any chemicals that are in the discharge, and is impacted by any predators that are seen on the lake. So although we have a model it is missing a number of things that I think are really needed to determine what in fact gets down to Illinois." (Tr. p. 13993)

* * *

"The problem with Dr. Csanady's model and indeed Dr. Pritchard's model in anybody's model is that they didn't know how much was coming out. They didn't know what was in it. They didn't know what happened to it when it got out. They didn't know what happened to it in terms of anything except the pure dilution values when it got down to the Illinois state line, and they never verified it under any conditions." (Tr. p. 14020)

On page 60 of its supplemental memorandum Illinois cites certain testimony of defendants' witness Carter in support of the lower court's finding of pathogen transport. That testimony, however, was addressed only to the behavior in water of *conservative* pollutants (i.e., effluent indicated by a patch of dye), and provides no support for the idea that viable pathogens are or could be occasionally transported to Illinois waters. For example, the following exchange occurred immediately before the testimony quoted in Illinois' supplemental memorandum:

"In two instances you indicated that the center of the dyed plume or patch would not have reached the Illinois state line but because of a certain forward dilution you felt that the leading edge might have gotten there?

A. That is correct, the material will diffuse ahead of the plume that is being released or rather somewhat ahead of the center of mass of the first parcel release." (Tr. p. 8671)

Illinois' citation of testimony in which the dispersion and dilution of a plume of water is traced by use of a conservative dye provides no support for the proposition that non-conservative pathogens reach Illinois waters from Milwaukee.

2. *Plaintiffs Have Failed To Prove That Viable Pathogens Are Or Could Be Transported From Milwaukee To Illinois Waters.*

There is no demonstrative proof that viruses are transported from Milwaukee to Illinois, and no witness gave an opinion of such transport taking into account the adverse factors found in Lake Michigan which will affect viruses. The *only* element considered by the plaintiffs with respect to viruses other than dilution was the effect of temperature.

Plaintiffs' witness Melnick testified:

> "Q. Doctor, do viruses die in the environment? If we dump viruses in the environment, do they die off?
>
> A. Yes.
>
> Q. How long a time are we talking about for enteric viruses to die off?
>
> A. It depends upon the time of the year. It depends upon temperature. As there is temperature fluctuation this varies a good deal.
>
> Q. Let's take the summertime with water temperature at 70°.
>
> A. I would say it would probably take about two weeks for it to die off.
>
> Q. Is that a range or [are] there longer times?
>
> A. It ranges. A virus may persist for months actually, and as you get into cooler weather, it will persist for an indefinite period of time.

Q. With respect to the viruses does each individual virus species or category have its own length of time that it persists?

A. More or less all the enteroviruses behave in a similar fashion." (Tr. p. 2199)

The fact that a variety of factors will adversely affect pathogens other than dilution or temperature was introduced early in the case by plaintiffs' witness Csanady.

"MR. KARAGANIS: Q. With respect to the concentration that you begin with and the concentration that you end up with, is there a factor other than dilution that can reduce the concentration?

A. Yes, for bacteria there is, of course the natural death process or other processes involving bacteria from the effluent such as other animals eating them. I am not familiar with the biological details, but I know that in calculating diffusion of bacteria one uses a decay factor or die off factor, from which it is possible to estimate what numbers of bacteria survive for a given length of time." (Tr. pp. 2047-2048)

However, once he introduced the concept of "other processes involving bacteria from the effluent such as other animals eating them" Csanady was brought back to limiting his testimony to die off related to temperature.

"Q. With respect to hydraulic transport and diffusion have you ever used or are you aware of standard engineering calculations which are used to calculate the die off rate for bacteria?

A. Yes, Mr. Karaganis. This is a textbook material. It is mentioned in a number of texts including the one that you brought here that I have written. It is common practice to describe the observed rate of bacteria, ob-

served die off rate of bacteria by a factor proportionate to the concentration so that the rate at which they die is proportionate to the number that is present.

* * *

Q. Is it correct that the rate at which bacteria will decay in terms of the equation that is used for die off, depends upon the water temperature selected for the analysis?

A. I am not really very well versed in the details of this but I have been using curves produced by people who are more familiar with the details of the situation. I know that generally they present the die off rate as a function of temperature.

Q. With respect to your calculations of die off in a situation of Milwaukee, did you use a particular die off equation?

A. I used a particular die off rate taken from a paper by Cannoli and others, which is quoted in the Envirex Report." (Tr. pp. 2049-2050)

The problems associated with predicting the survival of pathogens to the Illinois state line based upon the die off equations and coefficients "quoted in the Envirex Report" (Ex. 85 p. 74) which take into account *only temperature* (thereby ignoring sedimentation, predation, and other factors in the lake adverse to pathogens) is illustrated by the following exchange with the defendants' witness Carter. Note that Carter in his calculations used a dieoff or disappearance rate which took into account all factors affecting dieoff as found in defendants' tests run at Milwaukee. This is in contradistinction to the dieoff rates used by Illinois' witnesses which took only temperature into account.

MR. MCCABE: "Q. Mr. Carter, in making the calculations that you did for defendants' exhibits 1165 and

1164, you used in certain instances, what we call the die off or disappearance rate.

Now if the die off and disappearance rate which you used is taken from data such as you have calculated here, this will include not only the death of the organisms, as you indicated, but whatever else, with the exception of dilution, is happening to them, for whatever reason. In other words if they are settling out, if zooplankton or whatever else eats bacteria, is eating it in the lake, if there is a problem with chemicals in the lake, this type of coefficient will take that into account, will it not?

A. That's correct.

Q. If on the other hand you take a die off coefficient which merely reflects death in the laymen sense, and ignores sedimentation, either coming through the harbor or down the river or out into the break water, ignoring what is happening to the bacteria in the lake, for whatever reason *you are not going to get a result at the state line reflective of what is happening in reality in the lake, are you*?

A. *I don't believe so.*" (emphasis added) (Tr. pp. 8991-8993)

The fact that all of the adverse factors present in the lake with respect to pathogens must be considered is also testified to by defendants' witness Dr. Pritchard.

"By Mr. Karaganis: Q. Do you consider in-situ experiments where there is lake water in a bottle placed in the lake?

A. I don't consider that to be an in-situ experiment, no, because all of the factors involved, in-place grazing, sedimentation, do not enter into that kind of experiment.

What I am talking about is where one has followed the die off of bacteria in the body of water where all these processes can take place. That is what I call the in-situ measurements.

Q. When you say die off——

A. When I say die off, I mean in general, whatever happens, disappearance.

Q. Disappearance? In other words, they are not dead they are somewhere in the water column?

A. No. They may be in the belly of a zooplankton, or they may be on the bottom." (Tr. p. 7173)

The evidence shows without contradiction that in addition to dilution and thermal effects there are four additional factors present which will adversely impact against any viruses which may be discharged in the Milwaukee vicinity. They are: sedimentation, biological inactivation, ultraviolet radiation, and predation.

The potential for viruses to either settle out themselves or to adsorb on other particles which settle out was testified to by plaintiffs' witness Dr. Melnick:

"Q. Does adsorption occur in natural water, such as in Lake Michigan?

A. Well, the virus is adsorbed to solids that exist in the water.

Q. So if you have solids in the water, some virus particles at least would attach?

A. Yes.

Q. What happens to them when they attach to those solid particles?

A. They move with the solids. If the solids are settled out, one will find viruses on the solids. This is

why the virus is found in sludge, for example." (Tr. p. 2260)

Defendants' witness Dr. Sproul testified to the ability of viruses to adsorb to particles in water in the natural environment.

"A. This paper dealt with the adsorption of viruses to clay particles under conditions that would be experienced primarily in the natural environment, and we demonstrated for the first time that viruses under environmental water conditions have the ability to adsorb to relatively high extents on clay particles. These clay were those that were obtained from natural deposits as well as from naturally occurring clays which I previously had isolated from the Missouri River." (Tr. p. 10387)

Defendants' witness Dr. Cliver explained that the sedimentation process continues after effluent leaves the sewage treatment plant:

"Q. If the viral particle were adsorbed to a particle that were susceptible to sedimentation, would that mean that the viral particle would sediment with it?

A. Oh, yes, materials do settle out all along the way, to be sure.

Q. So in any event, the viral particle that had come through the treatment plant adsorbed to some particle, if that particle had settled to the bottom in transit, then the viral particle would settle to the bottom?

A. That is correct." (Cliver, Tr. pp. 10245)

The witness Pritchard introduces a series of ways in which pathogens disappear rather than being transported.

"Simply based on the fact that we can list the processes by which any living organism that drifts with

the water or moves with the water can disappear, and this is just general understanding of the basic physics and chemistry and biology, which I have training in, one process by which concentrations can change is by diffusion. We have talked extensively about that.

But a living organism can disappear as a living organism by dying. It can disappear as a living organism by dying. It can disappear as a living organism by being eaten, which is also death but we call that grazing.

So there is mortality, grazing, and then the living organism is a particle. It usually is attached to other particles which have a density greater than water. So the particles are settling out and the organism is settling out.

So there are, in addition to dilution, which I do not believe happens in the harbor, there are the processes of mortality, grazing, and sedimentation." (Pritchard, Tr. pp. 7014-7015)

Carter sees those factors which cause disappearance of living organisms as being distinct from those operating on conservative or non-living substances.

"Q. The basic question is on what you make your determination that the coliforms will be at their greatest concentration in terms of the patch released at the same time or at the same point that the dye is at its greatest concentration.

A. I am not sure I understand the question, but I think I can explain and get what you are trying to ask.

The concentration of dye and the concentration of coliforms are reduced by several processes. Both of them are subject to dilution by diffusion.

In addition, the coliforms are subject to additional factors which cause their disappearance, let's say.

Sometimes they settle out—sedimentation.

Sometimes they are eaten by another organism.

Sometimes there are not enough nutrients in the water to support them.

But over and above any decrease in concentration due to dilution, there is an additional disappearance which is termed the die-away rate or disappearance rate." (Carter, Tr. pp. 8586-8587)

Predation is shown to be a significant and widespread process in Lake Michigan.

"Q. Are many of the zooplankton able to eat bacteria in a manner similar to the benthos?

A. Any aquatic animal that eats particulate matter is going to ingest a substantial amount of bacteria in association with that particulate matter." (Otto, Tr. p. 10086)

Carter and Zanoni did a dye study at the South Shore Treatment Plant (Def. Ex. 86, App. C; Def. Ex. 282). The test showed that 90% of the fecal coliform in the treated sewage being discharged by that plant disappear within 8 hours and that virtually all such coliforms disappear within less than one day. This test is the only such test in evidence.

The rivers and the Milwaukee harbor which receive effluent discharges act as settling basins in which substantial decreases in solids, and therefore viruses and bacteria, occur.

"Q. You described the rivers or portions of the river as sediment basins.

What do you mean by a river being a sediment basin?

THE COURT: Did you sediment basin or settling basin?

THE WITNESS: Settling.

THE COURT: Settling, that is what I thought you said.

THE WITNESS: I may have said sediment. I mean settling.

The Milwaukee River is a classic example. You have flow coming over the North Avenue Dam. It has a certain solids content. The type, size and amount of solids in that water is dependent upon the velocity of that water.

Once the river passes over the dam and hits that portion of the river which is influenced by the lake, the velocity slows down considerably, and once you change that velocity, you are going to change the characteristics of the material which is being held in suspension.

The heavier particles, which need more energy to stay in suspension, will settle out. That is what I was getting at.

BY MR. MCCABE:

Q. Is that true during wet weather flows and dry weather?

A. It would be true during any type of flow condition. Any time you change your velocity of your river, you are going to change what is being held in suspension, even the lake. For instance, that is one reason why sandbars develop. You are changing something, the energy distribution of water past a point, and you are either going to get scour or you are going to get deposition.

Q. So that to the extent that the overflow from either the combined or the separate sewer enters the river, it is entering, in a sense, a settling basin?

A. Yes, that would be a good analogy." (Gruber, Tr. pp. 5174-5176).

A process of "purification" is constantly taking place in the water in the Milwaukee harbor.

"Q. On the basis of information in this little survey which you conducted of all the Health Department information, do you have any conclusion as to what takes place with the water that comes out of the river mouth and into the harbor area? What takes place out in here (indicating) after the water leaves the river mouth?

A. There is a variety of things that happen out there, which in the classical sense you would describe as purification capacity——

Q. Now, when you say—go ahead.

A. —or capability. One of the things you have to look at that area as is as a sedimentation basin that carries on a function comparable to the basins in the treatment plant.

Q. When you say a function similar to that in a treatment plant, can you describe that in a little more detail, what you mean by that?

A. In a sedimentation basin in the treatment plant, primary sedimentations are designed usually to control flow to drop solids, and the limit on flow is usually accepted as one foot per minute.

So that when the river discharges here are reasonable and the water flows in there and distributes itself within the harbor, the velocities undoubtedly get below

one foot per minute. Under those conditions then, you will get a significant dropping of the suspended matter in that area.

Q. In a sedimentation basin in a sewage treatment plant, what is the rate of flow?

A. One foot per minute.

MR. KARAGANIS: Excuse me, Mr. Moerke. I may be misinterpreting Dr. Sawyer's testimony.

Is it one foot per minute or one foot per second?

THE WITNESS: No, the grit chamber is one foot per second. One foot per minute in a primary sedimentation tank such as you have at the Southwest Plant.

BY MR. MOERKE:

Q. Do you believe that the natural purification in the harbor, to which you have just testified, results in the lower levels of coliform at the various harbor entrances? Is that the reason for why you get less counts at these other places?

A. Yes, there are undoubtedly a number of factors that are a summation of a lot of things that bring about the reduction in coliform organisms, sedimentation only being one of the items." (Sawyer, Tr. 7290-7292).

* * *

"Q. Based on the information in this chart, what conclusions can you draw from the plotting of the information on this chart, Dr. Sawyer?

* * *

A. The title of this is "Purification Adaptability of the Harbor Waters," and I think it demonstrates very effectively the ability of the water within the harbor to mitigate the coliform counts in the water leaving

the harbor through the main harbor entrance." (Sawyer, Tr. p. 7304).

Defendants' witness Dr. Cliver testified that he had, as a result of his experiments, determined that there was biological inactivation of viruses occurring in lake water.

"Q. What was the purpose, again, for doing this study?

A. We were interested in the rate at which virus was inactivated in lake water, and further were interested in the possible participation of micro-organisms that would occur spontaneously in lake water in the inactivation process.

* * *

Q. What conclusions were drawn as a result of this study?

A. Well clearly there is a range of stability of these viruses. They aren't all exactly alike in that regard. So one can't give a single value for die off rate for viruses at a given temperature.

Beyond that, it appeared that the living system that was involved here, the organisms in the lake, did participate in some way in the inactivation because if we removed them beforehand and then put the viruses in, inactivation was slower at the same temperatures." (Tr. pp. 10226-10229)

Dr. Melnick also testified that in order to determine a die off rate a number of factors about the biological makeup of the water environment would have to be known.

"Q. In order to determine a die off rate, so to speak, in Lake Michigan, wouldn't you have to know what types of bacteria were present, what types of viruses they would be giving off, what type of enzymes they

would be giving off, that is and how these enzymes would be reacting with heat if they did on viruses?

A. If that is what one wanted to study yes. I don't think that any useful information would come out of such a study." (Tr. pp. 2298-2299)

* * *

Q. Are there any types of biological inactivation one would expect in fresh water?

A. Not that would compete, let's say with heat. Heat would be much more effective a deactivator than, let's say, any enzymes that might be produced by bacteria which might be deleterious.

Q. Then you would expect in fact some enzymes from bacteria——

A. There may be. I said I don't know of any. If there are any, the amount of deactivation caused let's say by bacterial enzymes would be much less than would be caused by the heat the viruses would be subjected to.

Q. But they could be cumulative? In other words, in determining a die off rate for viruses, you would have to add the heat, ultraviolet and the biological?

A. There may be more than one factor. That's right." (Tr. pp. 2297-2298)

It should be emphasized here that although plaintiff's witness testified that in order to determine a die off rate, all of these factors would have to be known, the plaintiffs *never*, in fact, determined a die off rate in Lake Michigan which encompassed these factors, but only developed testimony centering on thermal inactivation and dilution.

The third type of inactivation which would occur in natural waters is ultraviolet radiation. Although the evi-

dence indicates that ultraviolet inactivation is not very significant because it occurs only near the water surface, such inactivation is a factor adverse to viruses which should have been considered. For example, Dr. Melnick testified:

"DR. MELNICK:

A. Radiation will also inactivate viruses.

Q. What type of radiation?

A. Ultraviolet radiation, for example. For that you have to have the virus present and exposed to a fairly large dose. That means you have to have a very thin layer of fluid in order to achieve inactivation by ultraviolet radiation.

Q. Ultraviolet light comes from the sun?

A. Yes.

Q. How thin of fluid would be required for inactivation?

A. A fraction of an inch." (Tr. p. 2292)

The final factor which will cause inactivation of or removal of viruses from the water volumn is predation. Like sedimentation, predation begins with adsorption to solids. Although sedimentation can occur with respect to either biologic or nonbiologic solids, predation occurs primarily with biologic solids which are edible. The witnesses have indicated that viruses will be adsorbed to or tied up with biological material in the water when they are introduced into the environment. Dr. Cliver's testimony addresses this point.

"Q. Once a virus were to get into water—now we are talking about an enterovirus for simplicity's sake—is it able to move under its own volition within the water media?

A. No, it may not even be free as a particle so that option would exist. The virus that occurs in feces and is

shed into sewage or other waste into the environment is produced by the cells that line the intestinal track [sic], and these cells are sloughed off at a great rate every day. So that very frequently the virus seems still to be associated with cells or fragments of cells in the feces.

In one way or another, these are to a considerable degree associated with solids and tend to diffuse in water in association with those. Otherwise, they diffuse free, but they have no mobility of their own that could govern their travel." (Tr. pp. 10188-10189)

Defendants' witness Dr. Sproul also indicated that the viruses discharged from a treatment plant would be adsorbed to the surface of biological material.

"Q. All right. What kind of solids are discharged by sewage treatment plants over the clarifiers?

A. Biological solids which are the principal solids that are discharged in this case have a light flocculant fluffy nature, in which there are a lot of pore openings into the bio-mass. That is the way these things exist.

Viruses were adsorbed unto the surfaces." (Tr. p. 10657)

The organic material containing the viruses or having the viruses adsorbed to them are consumed by the various natural predators within the lake, which begin their food chain with organic material found within the water column and at the bottom of the lake. Defendants' witness Dr. Otto testified as to the nature of the food chain within the lake.

"Q. With respect to the biota, would you give a general indication of how various levels react with one another in the lake?

A. They are principally interrelated from the standpoint that one eats another. Phytoplankton serve as a

food base for the herbivorus zooplankton and to a lesser extent for some of the macro-benthic organisms.

Periphyton, decaying organic matter on the bottom, serve as the major food base for the macro-benthic organisms.

* * *

In general, zooplankton eat phytoplankton and macro-benthics eat just about anything they can get their hands on, that is, on the bottom, and fish eat zooplankton and macro-benthos.

* * *

Some kinds seek out food or seem to seek out food in the sense that they have a specific food preference, which is expressed before they take a bite. Some kinds of amphipods would be examples of that.

Others such as the aquatic worms, seem to just move through the substrates ingesting the substrate material itself and digesting out what is available of an organic nature in that material and rejecting the remainder as feces. (Tr. pp. 10081-10083)

* * *

Q. Can you describe what zooplankton are a little more?

A. Yes, they are small crustaceans. They are free swimming in the water column. They have a hard outer shell as a skeleton rather than an internal skeleton.

* * *

Q. What is the food source of zooplankton?

A. . . . They will eat particulate matter if that happens to come along.

Q. Are there any of the zooplankton able to eat bacteria in a manner similar to the benthos?

A. Any aquatic animal that eats particulate matter is going to ingest a substantial amount of bacteria in

association with that particulate matter." (Tr. pp. 10085-10086)

Defendants' exhibit 1321 indicates the abundance of the many predator grazing organisms in the lake. Some grazing organisms can be as numerous as 10,000 per square meter in various areas of the lake between Milwaukee and Illinois. Since several types of such organisms may coexist in the same area literally tens of thousands of predators may be present in any one square meter.

Plaintiffs' case is totally devoid of any opinion by any witness that pathogens, either bacteria or viruses, will survive a movement in a body of water from Milwaukee to the Illinois state line. This is easily demonstrated by a point-by-point review of the transcript and record citations used by Illinois in its supplemental memorandum between pages 56-66, in which Illinois attempts to demonstrate the transport of those pathogens.

Beginning at page 56 through the top of page 58, testimony of plaintiffs' witness Verber is used. This, however, is limited strictly to the transport of water. No reference is made to any pollutant of a nonconservative nature. The second quotation in the middle of page 58, taken from plaintiff's exhibit 20 authored by plaintiff's witness Csanady, has already received some discussion on pages 22-23 of this memorandum. Plaintiffs' exhibit 20 used the word pollutant in its conservative sense. Dr. Csanady even defined a dye as a pollutant. Nowhere is there any attempt in plaintiffs' exhibit 20 to discuss the transport of a nonconservative pollutant such as a pathogen. Csanady's testimony as opposed to his writings are quoted beginning the bottom of page 58 through the top of page 60 of Illinois' supplemental memorandum. The bulk of the quotation concerns the transport of water alone. The context of the portions in which he refers to pollutants, without defining whether he is discussing a conservative or nonconservative

pollutant, reflects that he is using the term interchangeably with the transport of water.

Dr. Csanady, a witness upon whom Illinois places principal reliance, in fact has not worked on or done studies on Lake Michigan.

Csanady gave advice concerning an Argonne National Laboratory study (Tr. p. 1934). He did author a portion of plaintiff's exhibit 20 relating to Lake Michigan. However, it is specifically stated therein that the discussion is a general one which is applicable to all the Great Lakes. All data cited in the report is credited to other authors' work or to work Csanady did on other lakes.

At Tr. p. 1938, Csanady says he had "some contact with" work which was carried on at the University of Wisconsin in 1966 and 1969 both in Lake Michigan and Lake Superior.

At Tr. 2671-2675, Csanady states that he based his estimate concerning the frequency of transport from Milwaukee to Illinois primarily upon the work of Sato & Mortimer (Pl. Ex. 38).

On pages 15 and 16 of its original brief on appeal, and at page 58 of its supplemental memorandum, Illinois quotes from pages 115 and 116 of plaintiffs' exhibit 20 attributing the quote to Csanady. The first part of that quote is missing. The missing part reads: "In the section of this report dealing with lake currents, Dr. Mortimer points out that . . ." Csanady is actually quoting Mortimer!

In its supplemental memorandum, Illinois does not address the fact that a pollutant plume, much less nonconservative pollutants such as pathogens, would not reach points near shore in Illinois so as to present a hazard. The record reflects that it would not do so. The exchange on Tr. pp. 2583-2585 is as follows:

"Q. Fine. All right.

Directing your attention to Plaintiffs' Exhibit 134-A, this overlay map, with respect to these plumes that are drawn in here at various distances along the shoreline, in a typical situation how far off of shore would the western edge of these plumes be?

A. The western edge?

Q. Yes. The edge closest to the shoreline.

A. Well, it is difficult to define an edge there, but we were saying that as the plume travels along the shore, it is carried down by the faster currents, initially at any rate, the center of which is further from shore, several kilometers from shore. So that this leaves a band of smaller concentration on the in-shore side, of perhaps half a mile width.

It depends on the exact topography and current.

Q. You are saying the plume, the center part, the most concentrated part of this plume, could in fact get out into currents that are two or three miles offshore, is that right?

A. Yes. It will somewhere.

Q. So this pictorial perhaps is a little misleading in that it shows it right hugging the coastline, isn't it?

A. Well, it is in that sense, but, you see, it is very difficult to define the boundaries of the plume. The concentration simply decreases from the center as you go shoreward, and there is a certain decrease. The maximum occurs a certain distance from shore. But it doesn't decrease to zero. So that artist is perhaps justified to fill it in between the center of the plume and the shore zone as an area which is at least likely to be exposed to the influence of this plume.

Q. But you stated, did you not, that the portion of the plume we are most concerned with is the one of

maximum concentration? With respect to Illinois and getting stuff into Illinois, we are most concerned about the major concentration within the plume.

A. Certainly. For the reason, Mr. Moake, that it is sometimes washed up on the beach. It is two miles at this location, and then there is, say, a projection into the lake, and there you find this center line of the plume getting much closer to the shore and really fumigating.

Q. And it is right that the centermost concentrated part of the plume can get out two or three miles in fact within this near-shore zone offshore, isn't that correct?

A. Well, I would expect that this would be the normal situation, that the most concentrated part would be several miles." (Csanady, Tr. pp. 2583-2585).

Note that Csanady first locates the plume: "the center of which is further from shore, several kilometers from shore." Then Csanady describes the band of "smaller concentration" as being "of perhaps half a mile width" on the in-shore side. As a half mile is less than a kilometer, Csanady thus has the *entire* plume several kilometers from shore. He then reiterates that the center could get into currents that are "two or three miles off shore." Then Csanady discusses an artists perception of the plume saying that the concentration decreases as you go shoreward and "the maximum occurs a certain distance from shore." Csanady then hypothesies that there is, "say, a projection into the lake, and there you find this center line at the plume getting much closer to the shore." Csanady, of course, does not point out any such projection! Immediately after such hypothetical speculation, Csanady is returned to admitting "that this would be the normal situation, that the most concentrated part would be several miles [offshore]." When his assessment of the plume as extending a half mile toward shore is considered against the location of the plume two or three

miles is considered against the location of the plume two or three miles offshore, the plume and all ports of it are seen to be at a sufficient distance from shore as to present no hazard to Illinois, no matter what is in the plume!

But Csanady goes further. In accordance with the explanation found in the City of Milwaukee's original brief at pages 15 to 20 he specifically testifies that changes in currents result in "cleaning out the coastal zones."

> "Q. Is there any difference in your opinion between the effects of current reversal and the effects of upwelling and downwelling on diffusion of materials in the lake?
>
> A. No, that is the same phenomenon that we are talking about. The change from upwelling to downwelling that accompanies the current reversal, and that is the approximately physical cause of cleaning out coastal zones.
>
> As an upwelling changes into a downwelling or vice versa, there is this large mass exchange and that of course, is the direct cause of the removal of pollutants." (Tr. pp. 2704-2705)

Csanady had covered this point before.

> "A. At the time that the thermocline moves rapidly up, which is associated with the reversal of the current as we mentioned this previously, on a reversal of current direction there is a complete clean-out of the coastal zone. Whatever effluent that we had there mixes with the rest of the lake and that mechanism there basically underlies this process because, as the current reverses, the direction of the thermocline slope also goes from downtilt to uptilt or vice versa, and a massive exchange of water takes place between the coastal zone and the middle portion of the lake.

So this is what keeps the coastal zones in effect clean." (Tr. p. 2076)

* * *

"Court: What would happen if the slug reversed, say, after three days, and went back up north? And the current reverses again? What happens?

Witness: As the current reverses, Your Honor, that is coupled with the kind of on-shore/off-shore motion that completely cleans out the coastal zone. So when the current moves in one direction, as the wind starts blowing from the opposite direction, that moves the top water. So it cleans out the coastal zone.

Court: Where does it move it?

Witness: It mixes it up with the rest of the lake, the deep parts of the lake. We have never been able to find any trace of these things. We have done coastal-zone studies with dye, and after a current reversal, generally speaking it is not possible to find what happened to the dye." (Csanady, Tr. p. 2031).

In the light of the overall testimony of Csanady, one fact is clear. The pollutants, either conservative or non-conservative, which may have entered Lake Michigan at Milwaukee never get close enough to shore in Illinois to cause any hazard.

The portion of Csanady's testimony from page 2063 quoted at page 60 of the Illinois supplemental memorandum, which speaks of fecal coliforms, can be seen from a review of the surrounding transcript to be limited to considering dilution and the factor of thermal inactivation; however, Csanady himself recognizes, as indicated in the portion of this memorandum on conservative vs. nonconservative pollutants, that fecal coliforms do undergo degradation by such things as predation and sedimentation.

Next, Illinois quotes from Dr. Pritchard without indicating that Dr. Pritchard was very clear to point out during the testimony both before and after the indicated citation at transcript page 7175 that he was dealing with conservative pollutants (see pp. 20-22 *supra*).

The last portion quoted on page 60 is testimony of defendants' witness Harry Carter. The testimony refers to the movement of currents. It has no relationship whatsoever to a discussion of nonconservative pollutants and Carter himself is clear to point out at other portions of the transcript that in order to effectively judge whether a nonconservative pollutant can travel from Milwaukee to Chicago all of the factors have to be considered (see pp. 28-29 *supra*).

With respect to survival of pathogens, which Illinois conveniently divorces from the issue of transport, two witnesses are cited: Mr. Geldreich on bacteria and Dr. Melnick on viruses. The testimony on bacteria will not be reviewed separately from that on viruses as both are subject to the same factors of elimination and viruses, if anything, are more sturdy and longer-lived. The trial court has found that the bacteria count (fecal coliform on Illinois beaches) shows that there are insufficient bacteria in Illinois to indicate transport of pollutants from Milwaukee. (A.Ap. p. 35) We also note that Illinois' bacterial discharge standards are identical to those of Wisconsin, and Illinois should not be heard to demand a more stringent standard of municipalities 25 miles away in a neighboring state than it demands of its own municipalities. Of interest on this point is the position of EPA which permits a much more lenient fecal coliform count *on bathing beaches* than the 40 per 100 ml standard required by the trial ocurt to be observed 25 miles away from Illinois.

> "Q. Is it fair to state that with respect to the bathing beach standards, presently EPA is rethinking its

standards and that this is something of a continuing process?

A. We are always rethinking all standards. We are always trying to get a finer, more definitive answer to all of our standards.

At the present time, let me assure you that our standards are 200 fecal coliform per 100 ml, and there is a new publication—you haven't had the opportunity to review it—but a new one which I have seen a press copy of internally that will definitely say again 200 fecal coliforms per 100 ml is what we recommend." (Geldreich, Tr. p. 3161)

With respect to the issue of virus survival, Dr. Melnick is quoted. But, as in the past, the only adverse factor with respect to viruses which is discussed is thermal inactivation. As indicated above, Dr. Melnick himself is of the opinion that all of the other factors must be included in any discussion of die off. To justify a finding by the court that there are pathogens in Illinois waters, Illinois from page 62 through 64 quotes discussions of the transport of water by Dr. Csanady and Dr. Pritchard. These are discussions of the number of times that water would be transported from Milwaukee to Illinois. It confuses the issue of the transport of conservative vs. nonconservative pollutants. No discussion whatsoever of pathogens per se is found in these two citations.

Lastly, at page 64 through the top of page 66, there is a discussion of the fact that viruses settle to the bottom and that they might be resuspended at a later time. With respect to this, we note the following:

1. There is no testimony by anyone as to the conditions under which resuspension might occur;

2. There is no testimony by anyone that even if viruses are suspended they would in fact reach Illinois in an active state; and

3. Inasmuch as the currents are going to flow into the middle of the lake when there is a change in a southward current, any viruses not moved directly into the middle of the lake on the interruption of the southward flow would in all probability move after resuspension into the middle of the lake with subsequent current changes (see City's original brief pp. 15-20 and this memorandum pp. 43-44).

The only proof by plaintiff directed to the question of transport of *pathogens* (as opposed to conservative pollutants) was the dilution testimony of plaintiffs' witnesses who only took into account the factor of temperature as it may adversely affect pathogens. Thus, they *did not* take into account factors such as sedimentation, predation, chemical effects in the water or ultraviolet radiation. The record contains neither direct evidence of the transport of *pathogens,* nor any opinion by any expert witnesses of such transport. The lower court was therefore totally without evidence upon which to base a finding that pathogens, in fact, do survive the alleged journey from Milwaukee to Illinois.

B. Available Tests Were Not Performed.

1. *Viruses That Exist In A Body Of Water Can Be Found By Available Tests.*

"Q. Dr. Melnick, what specific testing for viruses have you ever done in Lake Michigan?

A. In 1943, during the polio epidemic, I spent a summer here studying that epidemic and testing for viruses in the Chicago River water and in Lake Michigan.

Q. What were the results as far as Lake Michigan were concerned?

A. We did not find any in Lake Michigan by the tests that we used at the time, but we found——

Q. Do you know whether or not Lake Michigan has been tested for viruses since that test?

A. No, I don't.

Q. Do you have any knowledge of any other tests that have been made with respect to viruses in any part of Lake Michigan.

A. No.

* * *

Q. In Lake Michigan, how many gallons of water would you need to reduce in order to get a sample that you feel would indicate the virus count?

A. It depends on where the sample is taken. For example, if one is testing raw sewage, it isn't necessary to use the Aquella machine at all. One can just take the raw sewage itself and test it without concentration.

If one is looking for virus in water that has been treated or even untreated but where the virus concentration is apt to be low, then one has to use larger volumes of water.

Q. If you were testing the water out in Lake Michigan, outside of the breakwater, let's say, or off of Chicago several hundred feet, how many gallons of water do you think you would need to run through the machine in order to get a sample that you could use.

A. I am not sure where the breakwater is that you mentioned in relation to——

Q. All right, let's put it more simply than that. Suppose you were going to take a sample of Lake Michigan water and test it for viruses and that you wanted to test that water that is 5 miles offshore.

Do you have any idea, could you tell the Court how many gallons or liters of water you would have to use?

A. I would say at least 100 gallons.

Q. What would depend on, how many gallons you would use?

A. It would depend on the virus concentration which is apt to be present.

Q. Did you ever do any testing with the Aquella machine in Lake Michigan?

A. No.

* * *

Q. You have no evidence which would prove the existence of any particular quantity of viruses on any day, do you?

A. I have not done any testing in Lake Michigan.

Q. You don't know whether there are any viruses in Lake Michigan, do you?

A. If what you tell me is true, that the sewage from Milwaukee is discharged into Lake Michigan, then I know there are viruses in Lake Michigan.

Q. Do you know that there are any viruses in Lake Michigan five miles from shore in Lake Michigan, off of Milwaukee?

A. No, I do not.

Q. Do you know whether there are any viruses in Lake Michigan five miles offshore at Racine?

A. No.

Q. Or Kenosha?

A. No.

Q. Or Chicago?

A. I have not tested any of these places.

Q. Do you know whether or not viruses have been detected in the raw water intake of any of the Illinois water intake?

A. No, I do not.

Q. Do you know whether viruses have been detected in the finished water from any of the water plants in the State of Illinois?

A. No, I do not." (Melnick, Tr. 2240-2248).

Viruses can be tested for and found.

"Q. Did you find any viruses in the Houston ship channel?

A. We sure did.

Q. How far down from the Houston ship channel is the—what bay does it run into? Is it Galveston?

A. Yes.

Q. Did you find any viruses in the bay, or did you test for any?

A. We didn't find any in the bay. But, as I recall, we found some about 10 miles or so from the source." (Melnick, Tr. p. 2301).

Wellings confirms that viruses can be tested for and found.

"Q. Have you actually tested the water of Tampa Bay for viruses?

A. Yes.

Q. How many times have you done that?

A. We have only tested those about—I think we did 3 gallons in toto because we are not funded for this, but once in a while I get curious about something and I say "Let's get it."

Q. Did you find any virus?

A. Yes, we did.

Q. How about the Gulf of Mexico?

A. Never tested the Gulf." (Wellings, Tr. p. 13350).

2. *Tests Could Have Been Performed To Show The Actual Relationship, If Any, Between Water-Borne Viruses And Viral Infection: None Were Used by Illinois Which, Instead, Relied Upon Speculations From The Discharge And Transport Theories.*

"Q. As a virologist, you from time to time have to set up studies, do you not, as to how to go about testing certain things?

A. Yes.

Q. As a virologist, what type of a test would you devise in order to test whether or not the use of recreational waters at a location of, say, Zion, Illinois had any direct relationship to the incidence of viral disease in the Zion population, Zion community?

A. You said in relation to disease as such?

Q. That is right.

MR. KARAGANIS: Excuse me, your Honor. I don't think Dr. Cliver has been qualified as an epidemiologist in terms of disease. They had a witness on who testified about that.

MR. MOAKE: I misspoke. I did not mean disease. I meant incidence of infection.

MR. KARAGANIS: Same thing.

THE COURT: Ask him if he participates in such studies.

BY MR. MOAKE:

Q. Have you ever participated in studies where you were trying to relate viral infections to water, for example?

A. There is a study very like what you are describing that is underway in Madison, and although I am not a participant of record, I was certainly asked to participate in the design of it.

Q. In your profession, do you attempt to devise tests in order to determine whether or not a virus in a given medium can cause infection?

A. Yes, and we also have occasion to try to determine directly whether or not the infection has occurred.

Q. If you were asked to determine whether or not a virus existing in a body of recreational water was in any way related to the incidence of infection in the community that used that recreational water, how would you devise that test?

MR. KARAGANIS: Excuse me, your Honor.

THE COURT: Overruled. He has plenty of expertise. He can give it from his standpoint.

There is no law that says you have to wear a particular badge——

MR. KARAGANIS: I understand that, but in none of the qualifications has there been any evidence that he has attempted to relate viral concentrations to human infection.

THE COURT: Even if he hasn't, I think his qualifications are good enough for him to express an opinion on it.

Go ahead.

By the Witness:

A. My choice would be to try to get volunteers who customarily swam in that body of water and the way that these studies are designed is to do a work-up on each volunteer, first to determine whether he or she is presently infected, but also to get what one might call demographic data on them, age, sex, area of the community in which they live, et cetera.

Then one attempts to find a matched individual who shares as many of those properties as possible but does not swim or doesn't swim habitually in the water in question.

If then the sets of matched individuals were willing to allow or to submit fecal specimens on some periodic basis, one could by quite standard virologic procedures test these to determine whether there was any significant difference in the incidence of intestinal infection with viruses in the group that swam as opposed to the group that didn't swim.

The Court: The old identical twin test.

Mr. Karaganis: Your Honor, the Court can take judicial notice. There are certain people who live up in the Waukegan-Zion area. Are there are volunteers?

By Mr. Moake:

Q. That sort of a test would not place the person who was swimming at any greater risk of infection than they would otherwise have by undertaking their normal daily routine, would it?

A. No, it was a given that these are people who habitually swim, and we assume that they habitually defecate, and so there is no real effort on their part other than saving the evidence for laboratory analysis." (Cliver, Tr. pp. 10246-10250).

C. Activated Sludge Plants Such As Those In Milwaukee Both Remove And Inactivate Viruses And Bacteria.

It is uncontradicted that the secondary portion of activated sludge treatment plants like those in Milwaukee both inactivate and remove viruses and bacteria. Plaintiff's witness Dr. Gerald Berg testified:

"Q. I wonder, Doctor, if you would read the portion of that report which I have outlined in pencil into the record, please?

(There was a brief interruption, after which the following proceedings were had herein:)

MR. KARAGANIS: You have to read it aloud, Doctor.

MR. MCCABE: I meant to read it aloud.

THE WITNESS: Oh, you want me to read it aloud?

MR. KARAGANIS: For the record, perhaps with the Doctor's voice, I wonder if we might just give that or I will read it into the record in lieu of the Doctor. It is a long paragraph, your Honor.

MR. MCCABE: How about if I read it?

THE COURT: All right, let Mr. McCabe read it.

MR. KARAGANIS: Mr. McCabe will read it.

MR. MCCABE: "Laboratory studies on the efficacy of a continuous flow bench model activated sludge unit have recently been reported. Raw sludge and virus were fed separately to this unit at rates which allowed 6 to 7 hour retention time, and the unit was seeded with 200 to 400 parts per million of activated sludge (expressed as volitile [sic] solids). Except with the 200 parts per million seed, the unit consistently removed about 98 percent of the Coxsackie 9, Coxsackie 89 virus and 90 percent of the poliovirus, type I. Coliform and fecal streptacocci [sic] removal were about 97 and 96 percent respectively.

'A control experiment, in which the unit was fed only virus and sewage in the absence of any activated sludge, showed that about 60 percent of the virus was removed. This latter observation would appear to indicate that suspended solids, colloidal material, and also perhaps toxic substances play a role in the reduction of virus as raw sewage is treated by activated sludge.

'The activated sludge undoubtedly removed most of the sewage-virus complex in addition to most of the remaining 'free' virus. Kelly, et al have recently reported on the removal of poliovirus in bacterial phage [sic] from sewage by activated sludge. Their data show that the removal of virus consist of at least two steps: 1, aeration in the presence of sludge floc and nutrients and 2, settling of floc. Their study and others give no information on the actual fate of virus removed, although Kelly's data suggest that viruses may be inactivated by biological antagonists in the sludge complex. This suggestion is supported by the isolation from sludge of at least four strains of bacteria with anti-viral activity.'

I am sorry, 200. When I said 200 to 400 per million of activated sludge, it was 200-4000." (Berg, Tr. pp. 12203-12206)

Plaintiff's witness Dr. Melnick testified:

"THE COURT: Does any part of the sewage treatment process other than chlorination remove or kill viruses?

THE WITNESS: Yes, sir, each procedure that is used in sewage disposal will usually inactivate a certain fraction of viruses present.

THE COURT: Do they participate in the activated sludge process?

THE WITNESS: Yes, activated sludge will usually reduce about 50 percent the virus that is present in

sewage, but if you start with something that is up in the area of thousands, you are still left with thousands when you finish.

THE COURT: Are viruses one of the eating organisms or one of the organisms that is eaten?

THE WITNESS: Is eaten. (Melnick, Tr. pp. 2208-2209)

* * *

Q. With respect to the activated sludge process itself, as you indicated may be 50 percent might be removed.

A. Yes, that is a fair figure.

Q. That is removal and not necessarily a kill, is it not? Isn't it a physical removal?

A. It could be a kill. It could be a die-off during the procedure . . ." (Melnick, Tr. p. 2212)

Defendants' witness Sproul also testified that the activated sludge process biologically inactivates viruses, in addition to physical removal thereof.

"Q. Are any viruses removed in the secondary phase of an activated sludge plant?

A. Yes, there are several mechanisms that take place whereby viruses are removed in a secondary treatment process. Specifically I am thinking now about the activated sludge process.

When viruses enter such a process, within a short period of time they are adsorbed to or are incorporated within the biological solids that are in the aeration tanks. One of the removal processes then is this: that when the activated sludge mass in the water is conveyed into a secondary clarifier, that biological mass settles to the bottom of the tank and those viruses that are incorporated within that bio-mass will be removed.

At the same time there is a destruction of the viruses that are incorporated within that biological mass. The principal means by which that occurs is by biological oxidation. (Sproul, Tr. p. 10421)

* * *

Q. You indicated that the bacteria oxidized organic material, and they also will oxidize a protein coat. That is your assumption, not based on quantitative data, but on your logical process.

A. Evidence in the literature.

Q. Other than the Moore paper, what other evidence is there in the literature?

A. I will have to go through the computation I just described, if you want to see that.

Q. Not the computation, Doctor. Just cite who has done it in the literature specifically?

A. Kelly and Sanderson.

Q. Kelly and Sanderson?

A. Chuvall has done it. And Ebba Lund has done it. Every investigator who has worked in the area of virus and inactivated sludge has demonstrated this." (Sproul, Tr. p. 10582)

Q. Are you acquainted with Dr. Otis Sproul?

A. Yes.

Q. Are his opinions of a quality that are respected by people in the field of virology?

A. Yes, they are." (Berg, Tr. p. 12211)

As the above evidence shows, there is both biological inactivation and removal of viruses and bacteria in a sludge treatment plant like the ones operated by defendants. All of the witnesses on both sides who testified on

that point were in agreement that such inactivation and removal occurs. The trial court's refusal to accept this uncontradicted testimony (A-Ap. p. 36) was incorrectly based upon Wellings' analysis that *one* of the studies relied upon by Sproul (and plaintiff's witness Dr. Berg, as well) was, in her opinion, inconclusive. (Tr. pp. 13253-13257). However, Wellings did not testify that such inactivation does not occur, and the trial court was without any record basis for his finding on that point.

III. THE REMEDY REQUIRED BY THE COURT IS NEITHER NECESSARY NOR REASONABLE

A. Totally Disregarding Costs, The Lower Court Ordered A Remedy Which Is Not Cost Effective.

The lower court has required the defendants to collect, transport and treat all combined sewer volumes necessary to prevent any combined sewer overflow (CSO) discharges for storms creating runoff volume equal to the largest seen in recorded history in Milwaukee, without regard to cost of or the cost-effective character of such order. The only evidence as to the cost-effective level of collection, transportation, and treatment of combined sewer volumes is contained in the Stevens, Thompson and Runyan reports (Pl. Ex. 23-30). There is no foundation for requiring collection of a storm volume having a volume greater than that indicated as cost effective by Stevens, Thompson and Runyan.

In this regard, it is significant that defendants have reached an agreement with the Wisconsin Department of Natural Resources (the state permit-granting agency which acts in conjunction with the EPA under the federal statute and permit procedures) which agreement provides for handling and treating combined sewer overflows on a cost effective basis regardless of whether federal funds are made available. (Def. Ex. 1311).

Among other standards, the lower court ordered defendants to treat effluent from its sewage treatment plants to reach standards of 5 BOD, 5 SS and to produce a free chlorine residual. The following citations to the transcript indicate that these standards are not necessary or reasonable. Plaintiff's witness Melnick and defendants' witness Cliver recognize the desirability of seeking a cost effective solution.

"Q. You did state this morning, I believe, that the solids which might be in the effluent might protect the viruses from the effect of chlorination, is that right?

A. Yes.

Q. So if you had, let us say, less than 30 parts per million of suspended solids, [what] would be the kill of viruses in an activated sludge plant with secondary treatment?

A. It depends on the size of the solids. In general the cleaner the effluent, the more effective the chlorination.

Q. Would you consider 30 parts per million of suspended solids to be a clean effluent?

A. I think it is reasonable. (Melnick, Tr. p. 2257)

• • •

Q. I understand.

In determining whether or not one should put in a sewage treatment plant with facilities that would guarantee the 5/4 standard or the 10/12 standard—excuse me a 5 or 10 standard on suspended solids or a 30, you did indicate that there should be some balance between the additional amount of viruses removed in comparison with the money expended when making that decision?

MR. KARAGANIS: Excuse me, your Honor. The objection I would have is is he talking about a 30-day average or is he talking about a single day's value?

MR. MCCABE: You name it.

MR. KARAGANIS: Well, if you talking five and five——

MR. MCCABE: The question goes to the balance between cost and benefit, not whether it is a 30-day average or not.

THE COURT: Yes, overruled.

BY THE WITNESS:

A. I think in all public measures, there has to be a balance between cost and benefit." (Melnick, Tr. pp. 2343-2344)

Similarly, Cliver testified that cost-effectiveness was an important consideration when assessing the appropriateness of a particular discharge standard.

"Q. Dr. Cliver, is it your professional opinion then that rather than rely upon the effectiveness of water treatment plants from the standpoint of public health, it is desirable that viral discharges from sewage treatment plants be reduced as far as is possible?

A. Yes.

THE COURT: Why is that?

THE WITNESS: Perhaps I shouldn't have given that an unqualified yes in the first place.

One can presume to reduce to where there is none detectable in a million gallons, 10 million gallons, as opposed to one gallon or 100 gallons.

I think other things being equal, it is well not to inflict virus unnecessarily upon the environment under

any circumstances, but as we regard viruses as agents of disease, we have to remember that this is one, and not perhaps the major, mode by which viruses are transmitted.

It is my opinion that a community will best deploy its resources to prevent virus disease if the resources are apportioned proportionately to the risk involved. So that if we are striving for no virus in 10 million gallons, we are putting some resources into that that might better be expended on interdicting other modes of virus transmission instead.

So that is why I ought not to have given an unqualified yes. We go to a waste water plant and we take perhaps 5 liters of effluent, and we may not test the whole 5 liters, and we would prefer to find a negative test result; but as far as some of the astronomic quantities of water that other people have proposed to test, I really don't see the purpose of that. I regard it as counterproductive.

So in the context, I would rather not see quantities of virus discharged in the environment because there is always the chance of human error; but I don't think that we ought to go overboard on it." (Cliver, Tr. pp. 10344-10346)

This evidence is consistent with the views of the Illinois Environmental Protection Agency which has (as noted in our joint reply brief at pp. 18-19) proposed the deletion of the Illinois 4 BOD, 5 suspended solids effluent limitation based upon the extremely high capital and operating cost necessary to achieve compliance with such a severe standard.

Defendants' witness Sproul testified at length to the substantial removals and inactivations of bacteria and viruses which occur in the Milwaukee plants. Thus the remedy

ordered by the trial court without regard to funding or cost has been imposed for the purpose of removing—at a cost of hundreds of millions of dollars—only the final small percentage of bacteria and viruses from effluent being discharged 25 miles or more away from Illinois.

"Q. With respect to chlorination of a secondary effluent, assuming effluent quality in terms of suspended solids and BOD, what range of removal could be expected if the solids were in the range, let's say, of 20 to 50 or 60 parts per million?

A. Well, this will depend upon the amount of chlorine which is added to the wastewater. But, as it has been practiced over the last 18 months in Milwaukee, at the South Shore Plant, I would estimate that a minimum of 90 to 99 percent of the viruses that are exposed to that disinfection should be inactivated.

Q. Would that, for instance at the South Shore plant, be an additional 99 percent of the other increments of removal in the primary/secondary?

A. Yes. (Sproul, Tr. p. 10458)

* * *

Q. I am sorry, April.

Based upon this data which has just been identified, plus your previous professional experience, do you have an opinion as to the percentage level of removal of virus that can be expected from the Jones Island Waste Water Treatment Plant?

* * *

MR. MCCABE:

Q. The first question is do you have an opinion?

A. Yes, I do.

Q. What is that opinion?

A. Are we talking about the disinfection stage?

Q. The entire plant of Jones Island.

A. The '77, '76, and '75 operating information from Jones Island would indicate that in the activated sludge portion of the plant, the removal of viruses should be on the order of 90 percent.

Further to that, the precipitation and removal of phosphorus——

Q. By the activated sludge portion, what are you referring to?

A. The activated sludge process itself.

In addition, within that activated sludge tank there is a precipitation reaction going on for phosphorus, iron phosphate, and that, as I previously stated, this removal under the conditions there will be approximately 50 percent removal by the mixed liquor suspended solids.

The disinfection data for 1977-'76 shows average empirimetric [sic] chlorine residuals on the order of about 2 milligrams per liter, and the information available to me for 1976 indicates that the average monthly information indicates that there are traces of free chlorine residual at the end of the contact period.

* * *

By the Witness:

A. Considering the amount of chlorine then which is appearing as a residual at the end of the disinfection stage, I would judge that the inactivation caused by the disinfection process is about 90 percent of those viruses that come into the disinfection state.

BY MR. MCCABE:

Q. So we would have approximately 90 percent in the activated sludge phase, plus an additional 5 percent as a result of the phosphorous removal by ferric chloride, and then 90 percent of whatever remained there would be inactivated by the chlorine?

A. Yes, that would total to a removal of about 99 percent for the incoming viruses to that particular plant.

THE COURT: Of the ones that reach the secondary treatment stage?

THE WITNESS: Yes.

BY MR. MCCABE:

Q. When you spoke of a trace of free chlorine, what did you mean by a trace? What type of measurement were you referring to in the records?

A. The records show a measurement of free chlorine for '76 by both the empirimetric [sic] method and the orthotolidine method. The monthly averages show more free chlorine by the orthotolidine process or method of measurement than by the empirimetric [sic]——

* * *

THE WITNESS: I indicated that I was basing this on an examination of 1976 operating records for the Jones Island Treatment Plant.

* * *

BY MR. MCCABE:

Q. Doctor, you indicated that you felt there would be approximately a 90 percent reduction in the activated sludge portion. Did that include or exclude the primary—I am sorry. There is no primary settling basin at Jones Island.

Doctor, have you made a similar evaluation of the data for the South Shore Treatment Plant?

A. Yes, I have.

Q. Do you have an opinion as to the approximate range of percentage removals to be achieved at the South Shore Treatment Plant represented by the data which you have reviewed?

A. Yes, in the activated sludge phase, the removal should be on the order of 90 percent, with an additional 50 percent removal of those viruses by the phosphate precipitation.

At the South Shore Treatment Plant, I think that the removal of viruses or the inactivation of viruses in the disinfection stage would be higher than that at Jones Island, in excess of 90 percent, perhaps as high as 99 percent.

Q. In terms of the South Shore Plant, the South Shore Plant has a primary sedimentation basin in addition to the activated sludge section of the plant, does it not?

A. Yes.

Q. Do you feel that that primary sedimentation basin would produce an additional degree of removal beyond the 90 percent plus 95 percent?

A. Yes, I do.

Q. What would that be?

A. It should be on the order of 90 percent.

Q. So there would be roughly 90 percent in the primary settling basin and then between the secondary treatment, when that is combined with the phosphorus removal, that would mean an additional 95 on top of

the original 90, and then the chlorine inactivation would represent another 90 to 99 above that?

A. Yes." (Sproul, Tr. pp. 10467-74)

One of the most vexing problems is to determine a cause and effect relationship between a discharge and the quality of the water into which the discharge is made. That problem is illustrated in the following portion of the record and by the change in the federal statutory approach to water pollution. The initial approach of the federal statutes was based on water quality. When that approach proved ineffective the statutory basis was changed to effluent specifications. Yet, the trial court acted on what it perceived to be a possible water quality problem over "geologic time" (A-Ap.p. 49) even though the experts were really unable to conclude with any certainty that the result feared by the trial court would occur. Instead of requiring plaintiff to prove that the lake was adversely affected, the trial court again held against the defense for failing to prove the negative; i.e., that water quality would not be adversely affected.

"THE COURT: I don't fully understand your statement, Dr. Katz, that the standard has nothing to do with water quality.

It is intended to achieve some kind of water quality or they wouldn't do it in the first place, isn't that right?

THE WITNESS: The connection goes something like this, that if we can get the gross pollutants out, let's say, through the activated sludge process, the assumption is it is going to help the water quality.

Now if you ask the question what kind of help will you get out of it, that relationship is not known, period. There may be instances in certain localities that they may be known, but the problem is that when you

get into the water quality issue, it is a site specific issue. One cannot administrate a law on a nationwide basis on water quality. One has to begin to then research based on the local conditions in order to obtain the necessary information that might relate discharge standards to water quality.

* * *

THE COURT: Does the matter become less site specific as you think in terms of longer periods of time for water quality?

THE WITNESS: I am not quite clear what the question means?

THE COURT: For instance, Lake Michigan has been said to be in pretty good shape. So I can see where one would say, "Well, quality is not really affected by any particular discharge."

Is that what you are saying?

* * *

THE WITNESS: Did I answer—I think you had a question outstanding.

THE COURT: I just wanted to make sure in my mind that I knew what you meant by water quality, and it seems that I knew what you meant by water quality, and it seems to me to try to restate my own confusion, I can see where you have two different questions, depending on if you are looking at it on a contemporary basis or what could happen over a period of time.

THE WITNESS: May I respond to that?

THE COURT: Yes, go ahead. I am not sure I have made it clear.

THE WITNESS: I think in terms of time and space, there are two issues. You pointed out the time element

in any body of water, and it depends upon whether it is a river or lake and the configuration of the lake and all these other issues, but there is another issue, and that is the space issue.

When you get into a body of water like an ocean or a body of water like Lake Michigan, the other thing you have to establish is whether you have a local pollution or are you talking about whether—you know, it is like saying what is the weather of the United States?

To me the weather of the United States whatever area you want to pick.

You have that issue, too. I am not saying here where we are at, but it is a basic issue.

The longer the time span that you have and the larger the area that you have, then you have to consider other input into the lake besides point of source. You have to consider all input because in the long term the state of Lake Michigan is a swamp, if you want to project the information. That may be 200,000 years from now.

I am not sure—I will speak only for myself—that I am qualified to be concerned for that length of time.

* * *

THE WITNESS: Don't misunderstand my statement, but there is a basic difference. Lake Erie was receiving point sources that were just raw sewage with no issue of a treatment plant involved at all.

I think with the Milwaukee situation, I think the issue is, with us at least, we are going to meet our permit requirements.

THE COURT: But my point was if you just think in terms of the water quality at a specific point, you can

take a deep spot in the lake and put the foulest kind of pollutant there and it won't have any particular effect.

On that basis you could justify any kind of pollution in terms of the receiving body of water being able to handle that at that particular point in time.

MR. MOAKE: Of course, I think what the Doctor is saying with respect to that is until you determine what effect dumping in the middle of the lake actually has on the lake, you are not capable of setting the standard by any rational means.

MR. KARAGANIS: As several witnesses have stated, and the Court has stated, those were the same exact arguments that were used on Lake Erie, "Wait and see what happens."

MR. MOAKE: We are not saying that.

THE COURT: Actually I didn't really mean to get into a broad discussion. I just wanted to make sure I understood what he meant by water quality.

THE WITNESS: The issue is complex, I would agree with you, and I am not sitting here, nor do I think the so-called experts have all the data they need to predict in a quantitative way what is going to happen to Lake Michigan in space and in time. At least I haven't seen that kind of information. (Tr. pp. 11215-12223)

* * *

Q. Isn't it a fact that the Senate Public Works Committee in reporting on Public Law 92-500 emphasized that the reason they wanted to go to discharge standards and move away from water quality standards was this very difficulty that you have mentioned, namely, trying to quantitatively relate what happened when the discharge came out of a pipe and what its impact was on water quality was?

A. It was an administrative nightmare.

Q. As well as a technical and scientific nightmare, isn't that right, because of——

A. Because of a lack of knowledge.

Q. (Continuing)—because of the lack of knowledge and because of the variables that exist within the natural environment, isn't that right?

A. Because of a lack of knowledge." (Katz, Tr. p. 11436)

With respect to the lower court's finding that a continuous free chlorine residual should be required (A-Ap.p. 7), the record shows that there are serious problems with the use and level of chlorine in sewage plant effluent. Thus, it becomes a matter for the experts to balance the results desired against the effects of procedures employed. It is the DNR and the EPA who should, through the permit procedures, make those balancing determinations.

"THE COURT: What would be wrong with just simply putting enough chlorine into the effluent to make sure that you did have a free chlorine residual left over no matter what the solids and no matter what the organics?

THE WITNESS: You could do that, your Honor, but it is expensive, and I say that not in the sense I could give you a cost, but this is a complaint I hear, that it is costly.

There is another problem that you have to deal with, and that is that the chlorine itself forms compounds which, for reasons that have nothing to do with the disinfection, can be a problem. Some of them are carcinogenic, cancer producing. The chloramines themselves are toxic in very low concentrations to fish and aquatic life, so that you have another step that you must take. If you are concerned about the aquatic life

in the area, you may have to neutralize the chloramines. So there is a little more expense there.

That this is terribly expensive, I cannot tell you that. I really don't know what those numbers will be.

There are other ways of disinfecting, too, your Honor. There are things that could be done. One could use ozone, for example. We talk about chlorine because it is most commonly used, but there has been, for a number of reasons, in recent years a great interest in going to other forms of disinfection." (Berg, Tr. pp. 12185-12186).

Chlorination of drinking water within a drinking water purification plant is the method of protecting drinking water supplies and it works.

"Q. So that we can get it straight, for the last 15 years there have been no outbreaks of water borne viral diseases——

A. No.

Q. —that were directly——

A. Explosive outbreaks.

Q. Okay, explosive outbreaks.

A. Implying very large insults and breakdown in treatment simultaneously.

Q. And there are none that can be directly related to a supply of water in a municipality where their supply of water is obtained through a water treatment plant, is that correct?

A. Say that one more time so that I am sure I am answering the right question.

Q. The water treatment plant that supplies water to the municipality, in those situations in the last 15 years

there have been no reported explosive outbreaks of water-borne disease.

A. From any municipal plant that treats its water completely, going through coagulations, sand filtration, chlorination, that is correct, there are no recorded outbreaks that I know about.

Q. And what you just have mentioned, coagulation, et cetera, et cetera, those would be referred to as a conventional treatment plant?

A. Water treatment plant, yes." (Berg, Tr. pp. 12227-12228).

Wellings, who believed that the greatest removal of solids possible was desirable in sewage treatment, identified the St. Petersburg, Florida Northwest Wastewater Treatment Plant (activated sludge) as having high virus removal because "very low" solids were coming out. Significantly, she testified that an effluent having up to 30 mg/l solids is "very low." That is the exact solids levels specified in defendants' discharge permits!

"Q. How does 95 percent removal of viruses relate to the amount of solids in the effluent in such a system?

A. Very closely because their solids removal was up around—well actually, the amount of solids coming out of their plant was 15 milligrams per liter, maybe 30 milligrams, maybe 18, very low solids when it was operating properly." (Wellings, Tr. pp. 13349-13350)

While the trial court stated that it accorded little credence to the Envirex net and shore studies (A-Ap. pp. 33-34) those studies were the *only* evidence in the record of *any* study made on nonconservative pollutants with respect to the geographical limits of the effect of Milwaukee's discharges to Lake Michigan. Mere criticism of the manner in

which those studies were made does not prove the *opposite* of the conclusions reflected.

"Q. All right. Do yau have an opinion as an environmental engineer as to whether you would recommend to your client the expenditure of such an amount of money in order to take out the last 5 percent of BOD and SS in a situation as it prevails in Milwaukee, where it is on Lake Michigan and where we have the river systems we have and so forth, all of the other things that are taken into consideration to which you have testified? Do you believe that such an expenditure would be justified?

A. You asked me if I have an opinion, and my answer is, yes I do have an opinion on that matter.

Q. What is your opinion?

A. Based on the sampling program that I supervised in the Milwaukee metropolitan area, referred to as a net survey, based on the other hard data that I supervised the collection of in the lake, noted as the shore surveys, based on all the other information that I looked at related to this case over the three, four-year period that I have been involved, it is my opinion that the expenditure of that amount of money is not warranted in the case of the Milwaukee situation there at Lake Michigan.

I do not see that the benefit derived to the lake—I just cannot see it—warrants that expenditure of dollars in that particular receiving water situation.

Q. Based on your experience and background and based on all of the studies that you have made and which you have testified to and the literature that you have read and the thought that you have given to this matter, do you have an opinion as to whether the expenditure of $253 million is justified in terms of pro-

tecting the waters of Lake Michigan and the water supply used by the citizens of Illinois in Lake Michigan or the use of the beaches south of the line, state line?

Do you believe such an expenditure is warranted to either protect the water supply of the citizens of the State of Illinois or their use of swimming beaches in the State of Illinois?

A. I do have an opinion, yes.

Q. What is that opinion?

A. Again based on my examination of all of the data before me, the hard data that we generated and the other data that was published, it is my professional opinion that the expenditure of that amount of money, $253 million, is not warranted for the situations that you noted, simply because I have not been able to discern and determine the impact of these discharges from the Milwaukee metropolitan on the lake. At least I can't discern that there is any kind of a serious impact. I just can't see the impact from all my studies.

The problems that are caused in the Milwaukee metropolitan area because of discharges in the lake and that area tend to be localized, as you would expect for any metropolitan area located along a water body.

Beyond that, I just cannot professionally discern a serious impact of our discharges on Lake Michigan.

Q. Do you have an opinion, Dr. Zanoni, based on all of your studies, background and experience and all of the books and documents that you have read, as to which of these parameters that have been discussed would be necessary and recommended to the Metropolitan Sewerage District of the County of Milwaukee for implementation?

A. Of what is noted on the chart there?

Q. Of the parameters all the way from 30/30 30-day average to a 4/5 never-to-exceed, which of those parameters do you think is necessary?

A. My opinion is—

THE COURT: Let me suggest that the question be answered in terms of what is necessary for the benefit of the lake.

THE WITNESS: I was going to respond that way.

THE COURT: Rather than the benefit of the immediate Milwaukee situation, since the witness has already said he feels the problem is localized.

THE WITNESS: In fact, I was going to respond in that fashion.

BY MR. MOERKE:

Q. Please do, Dr. Zanoni, respond in that fashion, if you would.

A. When I conducted the studies in the Milwaukee metropolitan area off of Lake Michigan and the shore studies and looked at all the other data available to me, these data resulted from discharges occurring in the lake at that time and for times previous to the present time. It is my opinion that even considering the discharges going into the lake at the present time—and that is what I am talking about, the discharges going into the lake at the present time—I do not note a serious deterioration or impact of our discharges beyond our local situation.

That is the only thing that I can really relate to because that is what is happening in the lake and that is what I was studying, the discharges going into the lake now and in the past years.

The only comment I can make on 30/30 is that it is the law, I presume, and that would be the main criterion or directive that would cause me to select 30/30; but if you talk about impact on the lake, I can only relate to what is going in the lake now and what has been going onto the lake in the past years. All I can say is based on the evidence I have seen and examined, the impact of these discharges tends to be highly localized, and beyond the local area, I do not see a serious deterioration of water quality.

MR. KARAGANIS: Just for clarification of the record, your Honor, the term "highly localized", is there a geographic limit to what he means by highly localized?

BY MR. MOERKE:

Q. Do you care to answer that question, Dr. Zanoni?

A. Well, we have been using the breakwater structure as a criterion, so in the case of the near-shore waters right off of Milwaukee, I would say the breakwater structure is localized, and possible 500 to 1000 feet outside of that area because that is how far we measured.

This is true of the shore survey. The shore survey we went out 500 feet and 250 feet, and at distances of 500 feet, we could not find evidence of deterioration.

So I am using these numbers as my reference point, and that is what I mean by localized." (Zanoni, Tr. pp. 4978-4983).

The tremendous costs of the remedy ordered as against the permit requirements for BOD and SS and the care with which those cost considerations should be approached is illustrated in the following testimony referring to a report of the Comptroller General of the United States.

"Q. I show you what has been marked for identification as Defendants' Exhibit 1105. Would you identify that document for the record?

A. This document is called "Report to the Congress by the Comptroller General of the United States."

Q. What is the date which is stamped on the front cover?

A. That is dated December 21, 1976, and the title of the document is called "Better Data Collection and Planning is Needed to Justify Advanced Waste Treatment Construction."

Q. I refer you to page 21 and ask you whether you can tell us what is on that page?

MR. MOERKE: I am sorry, your Honor. This is the only copy we have.

THE COURT: That is all right.

BY THE WITNESS:

A. This is a copy of a page showing a diagram of a sewage treatment plant including advance waste treatment. That is what we call a schematic. It is one schematic for one type of advanced water treatment showing primary treatment, showing secondary treatment, and showing advanced waste treatment.

BY MR. MOERKE:

Q. Now, with respect to this document, I would like you to please refer—excuse me just a second.

(There was a brief interruption, after which the following proceedings were had herein)

By Mr. Moerke:

Q. Dr. Zanoni, would you look at page 30 of that document?

A. Page 30?

Q. Yes.

A. All right.

Q. State generally what appears on that page.

A. On this page is a curve showing in a comparative sense the cost for secondary treatment versus tertiary treatment.

Q. Now would you read the second paragraph on page 30, please?

A. The paragraph is referring to this document and states as follows:

> "The following chart shows that with present technology it would cost at least five times as much to remove the last 15 percent of the pollutants in a waste water as to remove the first 85 percent."

Q. And then the chart is a chart on which you could pick off other costs for advanced waste water, is that correct?

A. Well, in a relative sense, right.

Mr. Karaganis: Foor the record, the record should indicate that the chart that is referred in that exhibit comes for another document called "The Economics of Clean Water," by the U.S. Environmental Protection Agency.

The Witness: Dated 1972.

Mr. Karaganis: Dated 1972, not 1976.

The Witness: No. 1972.

By Mr. Moerke:

Q. On page 31, then, would you please read into the record all of page 31, except for—well, yes. Describe the little chart that is there also.

A. It shows the construction costs for existing primary and secondary facilities and for increased capacity, including proposed advanced treatment facilities, for three plants, as of March, 1975.

It compares the Blue Plains, the Alexandria, and the Arlington plants.

The average capacity of the Blue Plains plant is shown as 309 MGD. The cost of existing facilities, as shown here, is $150 million. Under cost of proposed facilities, and a note is given, which says, "Does not include cost of existing facilities," so the proposed facilities costs do not include the existing facilities, and for nutrient removal they are talking about and mention here $335 million. Then under "Increased capacity and advanced treatment, including nutrient removal," it shows $482 million, over and above the $150 million for the Blue Plains plant.

There is a note here under "Nutrient removal, Blue Plains plant, Washington, D.C.," which says:

> "$100 million of this amount for nutrient removal has been deferred until a final decision has been made about the need for removing nitrogen."

Under Alexandria, the flow is 54 million gallons per day. The cost of existing facility is $4 million. Nutrient removal, $70 million. Increased capacity and advanced treatment, including nutrient removal, $104 million.

Arlington is $30 million gallons per day. Cost of existing facility, $6 million. Cost of nutrient removal, $36 million. And cost of increased capacity and advanced treatment, including nutrient removal, $64 million.

So if one totals up the costs for these three plants, existing facilities are $160 million, nutrient removal, $441 million, and increased capacity and advanced treatment, including nutrient removal, $650 million.

THE COURT: What is meant by "nutrient removal" as distinguished from existing plant? Isn't there some nutrient removal taking place in the existing plant?

THE WITNESS: There is. There is some nitrogen removal.

THE COURT: What kind of plants have they got?

THE WITNESS: They are talking here about phosphorus removal as one of the main nutrients by chemical addition. The other one they are talking about is nitrogen removal.

THE COURT: Aren't they talking about BOD and suspended solids?

THE WITNESS: That is part of the existing facilities and part of the normal advanced treatment. This is nitrogen removal in addition.

THE COURT: All right.

BY MR. MOERKE:

Q. On page 32, what type of information appears there?

A. Well, this is labeled "High operation and maintenance cost of advanced waste treatment facilities."

It shows the Blue Plains, the Alexandria plants and Arlington again.

Current annual operation and maintenance costs for secondary treatment is shown, and then they have "Projected annual cost after expansion and advanced treatment is installed."

For Blue Plains, the secondary treatment, $13 million per year; advanced treatment, $76 million per year.

Alexandria, $1.2 million for existing secondary; for advanced, $10 million.

Arlington, current existing secondary treatment, $1.4 million; advanced, $4.4 million.

If you total these up, as they did here, the current annual operation and maintenance costs for secondary treatment would be $15.6 million per year. The projected annual cost after expansion and advanced treatment is installed is $90.4 million.

The ratio here is approximately 6 to 1.

Q. How do these operating costs compare with the operating costs which you and Mr. Gupta calculated and which you testified to on direct examination?

* * *

BY THE WITNESS:

A. Basically what we see here, if we compare secondary to advance, we are talking about 6 to 1, and the cost we projected for the Milwaukee situation, if you compare existing cost to projected cost for the 4/5 never to exceed, you are talking approximately 3 to 1.

So we have a 3 to 1 ratio from existing to advance, and they have a 6 to 1 ratio from existing to advance.

That is all I can say about it in a relative sense.

BY MR. MOERKE:

Q. With respect to the Blue Plains Plant, I believe you stated from the record here that it was 305 million gallons?

A. 309.

Q. 309, and you calculated the flows in the Milwaukee situation and you lumped the two plants together at 320 million gallons a day, did you not?

A. That is correct, our costs were based on 320 million gallons a day.

Q. I would refer you to page 35 of Defendants' Exhibit 1105 and ask you, Dr. Zanoni, to just read into the record the conclusions and recommendations stated in that report?

A. I am reading from page 35. Under recommendations it states this:

"We recommend that before approving grants for constructing expensive advance waste treatment facilities, the Administrator of EPA determines that:"

And the first item is:

"All water pollution control alternatives have been considered.

"2. Adequate information has been obtained on expected water quality improvements, high initial capital costs, and annual operation and maintenance expense and sludge disposal problems that may result." (Zanoni, Tr. pp. 5721-5730).

The following exhibits indicate that the standards imposed by the trial court are not reasonable and necessary:

Defendants' Exhibit No.

3 — "A Virus in Water Study of Finished Water in Six Communities"

34 — "Virus Study for Drinking Water Supplies"

1357 — 1977 Jones Island Permit

1358 — 1977 South Shore Permit

1105 — Report to Congress (Comptroller of Currency)

1383 — Lake Co. Health Release

1384 — Letter re: Lake Co. Health Dept. Meeting

The following exhibits contain water quality data (fecal coliform counts) which show that, from a health standpoint, the water quality of Lake Michigan is good when compared to bathing beach standards. Lake Michigan's water quality is of course, found to be in that good condition with effluent standards which exist under the present permit operating requirements, even though, as Illinois and the court below noted, those standards have not been met consistently as they will be under the DNR requirements.

Defendants' Exhibit No.

67, 70, 71, 71-A	U.S. E.P.A. data
129, 130, 131, 132, 134 A-D, 154	Illinois E.P.A. data
1035, 1037, 1038, 1039, 1040, 1106	Chicago Water Dept. surveys
1087	Illinois E.P.A. data

B. Wellings And Berg Have Insufficient Bases Upon Which To Opine About The Efficiency Of Wastewater Treatment Plants, Much Less To Opine About The Operation Of Drinking Water Treatment Plants; Wellings And Berg Are Not Sanitary Engineers And They Have Not Tested Lake Michigan Or Drinking Water Treatment Plants.

At paes 49, 50, and 51 of the plaintiff's memorandum, Wellings is cited as support for various propositions concerning wastewater treatment plant operations and efficiency. The following citations to the transcript show that Wellings does not have sufficient background as to the *operation* of a sewage treatment plant to opine as she did thereon and they further show that the samples that she has taken, and upon which she bases her conclusions, are invalid because of the sampling and testing procedures she used.

Concerning Wellings' "tests" of sewage treatment plants:

> "Q. And your answer, [that she has not tested in the Lake Michigan area] would be similar as to sewage treatment plants, would it not?
>
> A. Yes, up in this area, right? (Wellings, Tr. p. 13346)
>
> * * *
>
> Q. How many tests do you feel you have run on primary effluent?
>
> A. Well, that would fall probably close to hundreds. To explain, we would just go through the plant and pull up samples. We didn't start out to do a treatment plant efficiency study. We started out to find out roughly was there a lot of virus coming in this plant, did it proceed through the plant—not quantitatively. We weren't interested.
>
> My interest is in what is coming out in my secondary effluent that is going to be sprayed on the ground. That was my interest. I would have designed experi-

ments quite differently had I been doing an efficiency study of a plant, and so I think to try and take my data and apply it to an efficiency of a plant is sort of misuse. (Wellings, Tr. pp. 13382-83).

* * *

Q. Now, when you ran tests on raw sewage, did you simultaneously run them on chlorinated and non-chlorinated effluents?

A. We took a series of samples. When you say simultaneously, I don't know what you mean. What we did was to go into the plant. Many times I would go in myself and collect the influent and primary and even some of the sludge off the aerators, and so on and so forth, through the plant, stick them in my car and go to the lab, and then we would process them.

Q. Did you ever attempt to relate the strength of an influent over time to the effluent, either chlorinated or unchlorinated?

A. No. But after sitting here through all of this, I thought, well, I should go back and write a paper on all the data I have accumulated, because it is probably more than anybody in the world has at the moment on these types of plants, and perhaps if I carefully evaluate the data and get the plant records and tie it all together, it would probably be interesting reading.

Q. You haven't done that yet, have you?

A. But I have not done that, because I am not interested in it, really.

Q. You have never attempted to tie plant records to influent or chlorinated effluent or unchlorinated effluent?

A. I really don't care.

MR. KARAGANIS: Plant records, Mr. McCabe?

THE WITNESS: When you say "records"——

By Mr. McCabe:

Q. Plant operation records.

A. I have looked at some solids data, suspended solids data, but to relate it quantitatively, never.

Q. Never?

A. No. (Wellings, Tr. pp. 13386-13387)

* * *

Q. My question, and I am sorry if I confused you—I certainly didn't mean to, and I apologize if what I indicated seem to be unfair—but in terms of sludge age, I am referring to the fact that when sludge, or when effluent moves from the primary settling basin into the secondary portion of the treatment plant, when that effluent moves into the secondary portion, a certain amount of return sludge from the clarifiers is added to that effluent, is it not?

A. Yes. It is to keep up the bacterial growth and that kind of thing. To keep it operating.

Q. That mixture is put into the aeration basins and aerated for a certain length of time, and moved from the aeration basin into the clarifier, a certain percentage of those solids being taken off and wasted, a certain percentage being shunted around back to where they began and added to any effluent, back in the aeration basin, and this process goes on for some time?

Now, how long, in that sense, not in the digester sense, is the average—in quotes—particle of sludge in a secondary treatment portion of a plant?

A. I don't know, I am not a sanitary engineer. I cannot tell you.

Q. Without that knowledge, are you able to come to any quantitative estimate at all of the percentage removal efficiency of a plant?

A. Earlier on I said that I had not tried to define the percent removal within plants, except in that one thing, where we talked about that it looked like 90 percent or 90 some percent. But I am only interested in what is coming out the other end. That is the crux of the matter, where it is going onto the ground, whether it is going into a deep well, or whether it is going to be discharged to surface water. It is how much is being discharged." (Wellings, Tr. pp. 13398-13399)

Wellings has *never* attempted to determine what benefits, if any, might be obtained by requiring a discharger to meet a 5/5 standard rather than some other standard, such as the 30/30 standard which she herself characterized as "very low" solids. Her generalized guesstimates about what she "would like to see" in the way of solids removal provide no support for the 5/5 standard ordered by the lower court.

"Q. Have you ever tried to correlate the number of viruses per liter in secondary effluent to the solids and/or BOD in that effluent?

A. Not really.

Q. Not really?

A. No, in measured terms, no.

Q. Chlorinated or unchlorinated?

A. Chlorinated or unchlorinated.

MR. KARAGANIS: I am sorry, Doctor. I didn't get your answer.

THE WITNESS: Chlorinated or unchlorinated.

MR. KARAGANIS: Did you say in measured terms?

THE WITNESS: In measured terms, yes.

BY MR. MCCABE:

Q. Is that a qualification to my question? In other words, in measured terms, have you ever tried to do it in any sense?

A. Well, how else could you do it except in measured terms? I don't know. (Wellings, Tr. pp. 13399-13400).

* * *

Q. Do you have any knowledge as to whether or not viruses are inactivated as opposed to being removed prior to chlorination in an activated treatment plant?

A. All I can answer that with is you get viruses out of the unchlorinated, and we get them out of the chlorinated plaque forming units, which means they are visible. You lose some viruses through there.

You know, viruses have a life span. I don't know that the life span is. Neither does anybody else—under certain conditions. So that die off of those viruses would be so varied, it depends on what they are in and what the temperature is and how much moisture is there, and there's so many variables.

Q. Are there any factors besides temperature and moisture in a sewage treatment plant prior to chlorination—we will exclude chlorination from this.

A. Well, some work—what was it—Ward did recently show some, but this is again pilot plants, little experimental models, some ammonia that can inactivate viruses, if they are free. It can't touch them if they are in a solid.

Q. Do you know of anything else that might inactivate a virus in a secondary treatment plant?

A. I suppose an amoeba might pick up a piece of solid or something if he had something to eat there. I don't know. . . . (Wellings, Tr. pp. 13404-13406)

* * *

Q. With respect to the solids on the days that you saw solids coming in, solids going out, either zero removal or more coming out—I am sorry. Virus are coming in, virus going out at the same level or a higher level, were there also high levels of solids associated with the effluent?

A. I did not go back and check these. I didn't measure it." (Wellings, Tr. pp. 13431-13432)

At pages 53, 54, 105 and 106 of the plaintiff's memorandum, Berg is cited as support for various propositions concerning wastewater treatment plant operations and efficiency. However, Berg's knowledge about sewage treatment plants and their operation is sorely deficient, and his sampling and testing procedures were void of any scientifically respectably methodology. There is no reason to give any credence to his conclusions.

"MR. MCCABE: You spoke of a particular series of tests which you have in mind. When were those series of tests run?

THE WITNESS: They were run, if I recall correctly, in the second part of 1975, '75, yes. I believe that was it.

MR. MCCABE: So you ran a series of tests in the second part of 1975 off of some sewage from the Sycamore Plant in Cincinnati?

THE WITNESS: Most of them were from Sycamore. There were, I believe, two other plants involved.

MR. MCCABE: Did you go out and get the samples yourself?

THE WITNESS: No, I did not.

MR. McCABE: Do you know how they were obtained?

THE WITNESS: They were obtained by technicians.

MR. McCABE: Sanitary engineers or virologists?

THE WITNESS: Virologists.

MR. McCABE: Did they have any sanitary engineering training?

THE WITNESS: No.

MR. McCABE: How large were the samples?

THE WITNESS: Oh, I would imagine probably——

MR. McCABE: Do you know?

THE WITNESS: I can tell you the size of the samples that we tested usually running somewhere around 200 ml's to a liter, perhaps 2 liters. A total amount that they usually pick up runs into several gallons.

MR. McCABE: What type of plant is the Sycamore plant?

THE WITNESS: The effluents we took at this time were primaries—raw sewage, I am sorry.

MR. McCABE: Raw sewage?

THE WITNESS: Yes.

MR. McCABE: So you tested in the latter half of 1975 some raw sewage from a treatment plant?

THE WITNESS: Yes. (Berg, Tr. pp. 12033-12035)

* * *

Q. Doctor, I can go back over your specific literature experiences, but generally would you tell the Court what experience you have had in measuring removal

efficiencies of primary plants, secondary plants, and activated sludge secondary plants?

A. Yes, over the years, for one reason or another, we have sampled effluents at these plants, sometimes as part of surveys, sometimes for other reasons. We have also done a certain amount of work in the laboratory with some sundry procedures.

Q. With respect to your experience with an activated sludge plant, would you give the Court your opinion or your experience of—I am sorry, not your opinion but your experience—with respect to the removal efficiencies of viruses from activated sludge plants that you have studied?

MR. MCCABE: Objection, your Honor. I think we ought to go into that a little bit more.

THE COURT: I think so.

BY MR. KARAGANIS:

Q. Would you describe what activated sludge plants you have studied?

A. I couldn't give you any detail on them. We have studied plants going back over the years.

Q. All right.

A. I can tell you what the general experience is that we have had, but I couldn't cite for you right now without going back into the data books where those plants were even.

Q. Were they various plants around the country?

THE COURT: Tell us the methodology that was used to survey them.

THE WITNESS: Your Honor, the methodology has changed over the years, so I couldn't even tell you ex-

actly what methods we happened to use. I could make a guess, but that would be all I could do, methods by and large less efficient than we have available today.

THE COURT: Just basically, would you obtain samples from these various plants?

THE WITNESS: Yes, we obtained samples from the primary effluents and from the secondary effluents and we would measure them coming out.

BY MR. KARAGANIS:

Q. So you would measure the liquid portion of the primary effluent without measuring the solids that were down below?

A. That is correct.

Q. Then you would measure the effluent from the activated sludge plant?

A. That is correct. (Berg, Tr. pp. 12051-12053).

* * *

Q. Now with respect to the tests for the monovirus in primary sludge, you indicated that your response—not in primary sludge, in raw sewage—you indicated your response was based on a number of tests you did in late 1975?

A. Yes.

Q.Once again you were not sure where those samples were taken in the sewage treatment plant?

MR. KARAGANIS: Objection, your Honor. He did not say he was not sure, and I am not going to suggest that that was not his testimony yesterday that he was not sure where the samples were taken.

Mr. McCabe asked about whether they were before bar screens or fine screens or whatever the case, but

the witness testified as to primary influent, raw sewage.

THE COURT: Overruled, he can answed the question.

THE WITNESS: Well, as I said to you yesterday, after the initial comments, when my people go into the sewage treatment plant, they are not free to roam around any way they like. They ask for what they want, and it's given to them or they are told where to get it.

Now, I do not know exactly where it came from, but they were given what was supposed to be raw sewage. (Berg, Tr. pp. 12144-12145).

* * *

Q. Whereas, your tests in the activated sludge process in plants involve something like the following:

You go to the head of a plant or you send someone out to talk to the plant operator and say "Give me a sample of the effluent going into the secondary portion of the plant and then give me a sample of the effluent coming out of the secondary portion of the plant," is that correct?

A. That is the kind of thing that has been done in the past. You are correct.

Q. And that is the kind of thing that you did in determining zero, 50 or 80 percent removal, is that correct?

A. In most of those determinations this is what was done. We are saying that they were done at the same time. Is that what you are alluding to?

Q. I am asking if that was the procedure.

A. Yes, the samples were taken at essentially the same time.

Q. You walked from one end of the plant to the other end of the plant, took one sample at one end and took one sample at the other?

A. That's correct.

Q. That is a hardly scientifically respectable manner of determining percentage removals, is it?

MR. KARAGANIS: Objection, your Honor.

THE COURT: Overruled.

BY THE WITNESS:

A. Counsel is making a good point. I am well aware of it. We didn't think about it during the early studies, but it is true that the sewage moves through the plant, and there are going to be certain variations in the level of virus that you expect during different times of the day, because people normally tend to move their bowels at more or less regular times. So the point is well taken.

I expect that the numbers will be different at different times of the day, but I don't think that they are going to be so different that you can't get some kind of reasonable estimate.

You are quite correct. The better way to do that kind of thing, if you can, is to try to determine how long it takes that material from the influent to get to the effluent and to temporarily adjust the sampling to those schedules.

BY MR. MCCABE:

Q. Are you saying, then, Doctor, that it would have been better to—let's call this the pipe leading into the secondary or activated sludge portion of the plant, (drawing), and this will be the aeration basin, and

that will be the clarifier, and this is the effluent channel.

Are you saying that it would have been better to determine how long it takes the liquid entering at X to move through the aeration basin to the clarifier and over to point Y, which would be the weirs, or the point where the liquid moves out of the clarifier? In other words, determine a, the length of time it takes to get over to Y. That would have been better procedure?

A. This would have been the better procedure, and it has been done. But you must understand it is not a perfect procedure, because engineers do this kind of thing from time to time, and we know that the stuff doesn't move through as a slug, that there is a certain amount of short circuiting, that some get through faster, that some does not get through as well. So you end up even here with a certain amount of averaging out. But I think on the whole this would be the better procedure.

Q. Do you have any idea how long it would take an effluent moving from point X to point Y?

A. I think it depends upon the plant. I couldn't give you estimate, but I don't think it is going to be the same in all plants.

Q. Are you familiar with the process of activated sludge?

A. In a general way. I am not an expert on activated sludge.

Q. Are you familiar with the concept of taking a certain percentage of the solids in a clarifier, routing them back to the head of the aeration basin?

A. Yes.

Q. And you realize that this routing process goes on continuously all day long?

A. Some of the sludge goes back.

Q. How much of it goes back from the clarifiers to the head of the aeration basin?

A. I don't know that.

Q. Would it surprise you if I said they took off 90 percent and disposed of it through their sludge disposal process and routed 10 percent back to the head of the aeration basin?

A. It wouldn't surprise me, but I don't know what the amounts are.

Q. Would it surprise you if they took 90 percent off rather than 10 percent and routed it back here (indicating) and only took 10 off?

A. If they took only 10 off?

Q. Right.

A. I suppose I would have to tell you that that wouldn't surprise me, either, but I don't really know. (Berg, Tr. pp. 12150-12155)

* * *

"Q. With respect to chlorine removal, with respect to inactivation of secondary effluents by chlorine, have you ever, first of all, done any of the type of experiment whereby you would measure the amounts of effluent leaving the clarifiers in an activated sludge plant, which is "Y", and then in that activated sludge plant you would have a chlorination, and then take a sample at Point Z?

Have you ever done any sampling of that nature? Do you understand the diagram?

A. Well, you mean as opposed to sampling material coming into the activated sludge plant?

Q. Right, I am talking about samples——

MR. KARAGANIS: You are referring now to Defendants' Exhibit 1398?

BY MR. MCCABE:

Q. I am talking about samples you would take after the effluent has spilled over the weirs on a secondary sedimentation tank, before it moves into the chlorination chamber. Take a sample there and take a sample at Z, which is the point after it leaves the chlorination chamber.

Have you ever done any sampling like that yourself?

A. Personally, you mean?

Q. Yes.

A. Have I gone out and done it?

Q. Have you ever received the samples and worked on them?

A. Yes. We have received samples of that kind over the years, not a great number, but we have.

Q. Which plants would that be in?

A. I couldn't tell you that. Not in Cincinnati. I can tell you that.

Q. How long ago was that?

A. Oh, the studies, I think, have got to go back at least five to ten years, perhaps even more. I can't even remember why we did them.

Q. Do you know the chlorine dose levels that were being given?

A. Well, I can remember specific cases with chlorine readings of about 2 to 3 parts per million, even perhaps just a little bit higher, where we found no de-

tectable losses in the amount of virus. That is the amount going in seemed to be roughly the same as the amount going out, or perhaps I should say it the other way: the amount coming out seemed to be about the same as the amount coming in.

Q. With the same type of bucket sampling, where you take a sample at one end and you take a sample at the other?

A. Right.

Q. How long was the detention time at the effluent pipe?

MR. KARAGANIS: Detention time between Y and Z.

BY THE WITNESS:

A. That is an important factor, but I don't remember exactly. (Berg, Tr. pp. 12174-12177)

* * *

BY MR. MCCABE:

* * *

Q. Dr. Berg, if we could go back briefly to a point that we were discussing this morning in terms of sending people out from your department to select samples for your determinations of the numbers of viruses in raw sewage and for your grab samples of secondary effluent in the sewage leaving the primary section of the plant moving into the activated sludge plant, do you know whether they took their sample from the top, let's say, quarter or two of the influent canals or down at the bottom, whether they took composite samples?

A. No, I don't know.

Q. Would that make a difference, you feel, in the virus counts that you might get?

A. I don't know.

Q. To the extent that the viral particles are attached to solids which may be in the process of settling out or being moved along the bottom rather than up at the top because of their specific gravity, to that extent you would expect to find greater viral concentrations near the bottom rather than at the top, would you not?

A. If you are talking about the total sewage, I think the answer would be yes. But don't forget that by and large the measurements that we have been making have been in the liquid portion." (Berg, Tr. pp. 12193-12194).

Conventional water treatment plants in the U.S. all produce drinking water which is not a hazard to the public health. They may be relied upon to protect the public drinking water. It is not the sewage treatment plant which produces drinking water for the public.

"Q. In your opinion, Dr. Cliver, based on your participation on the committee you just referenced [The Microbiology Subcommittee of the National Academy of Sciences—National Research Council Safe Drinking Water Committee], and based on your examination of those two exhibits, 34 and 3, is the technology which is presently employed in the typical U.S. water facility capable of inactivating viruses to the extent that the drinking water from those facilities does not present a public health hazard?

* * *

Q. Is it your opinion that the answer to that question would be yes?

A. Yes." (Cliver, Tr. pp. 10216 and 10222).

* * *

"Q. Are you familiar with the treatment plants, let us say, in Chicago and Zion and Waukegan, Illinois?

A. I have no close familiarity with those plants.

Q. Dealing with the conventional treatment plant as we have been in the United States——

A. You are talking about water treatment?

Q. Yes. Water treatment. In your opinion, are those water treatment plants, the conventional ones that we have in the United States, currently treating water to such an extent that the water being sent from those plants to the homes in communities through the distribution system does not constitute a hazard to the public health?

A. It does not constitute a public hazard? I would like to answer that question directly, too.

If you are talking about going through the usual settling procedures, pre-chlorination, the coagulation, filtration, and subsequent chlorination, and if you bring the turbidity down to a very low level, to tenths of a part per million, and chlorination is adequate, then I would say that you are probably doing as much as we can do at the present time, the only question being that of what might possibly be coming through in the small amount of turbidity that is coming through, and the other being the possibility of breakdown in the plant, which does happen from time to time.

Q. What you just described is a conventional plant in the United States?

A. It is conventional as I think of "conventional." (Berg, Tr. pp. 12231-12132).

"Q. So that we get it straight, for the last 15 years there have been no outbreaks of water borne viral diseases——

A. No.

Q. —that were directly——

A. Explosive outbreaks.

Q. Okay. Explosive outbreaks.

A. Implying very large insults and breakdowns in treatment simultaneously.

Q. And there are none that can be directly related to a supply of water in a municipality where their supply of water is obtained through a water treatment plant, is that correct?

A. Say that one more time so that I am sure I am answering the right question.

Q. The water treatment plant that supplies water to the municipality, in those situations in the last 15 years there have been no reported explosive outbreaks of water-borne disease.

A. From any municipal plant that treats its water completely, going through coagulations, sand filtration, chlorination, that is correct, there are no recorded outbreaks that I know about.

Q. And what you just have mentioned, coagulation, et cetera, et cetera, those would be referred to as a conventional treatment plant?

A. Water treatment plant, yes." (Berg, Tr. pp. 12227-12228).

"Q. Other than taste and odor problems, have you had any other problems with your water treatment plant?

A. By "problems" what do you mean?

Q. For example, have any other organisms affected your water treatment plant, to your recollection?

A. No." (Goodin, Tr. p. 13535).

Defendants' Exhibit 3, which was a publication resulting from tests at water plants whose source water was badly contaminated, states:

> "The fact that these water treatment systems were challenged by very poor source water on numerous occasions and yet produced a finished water in which no viruses could be recovered seems to confirm the adequacy of good conventional treatment for virus removal." (Def. Ex. 3, p.9)

The evidence of drinking water treatment plant performance is not only clear, it is uncontradicted in the record. Drinking water treatment plants protect the public. Although Wellings raised questions as to their operation, she is without any qualifications to do so:

> "Q. During your direct testimony, you were asked some questions about water treatment plants. Have you ever analyzed the backwater back-filter sludge from water treatment plants for viruses?
>
> A. No, I have not.
>
> Q. What water treatment plants are you familiar with?
>
> A. Well, I am familiar with the Tampa Water Group but not to the point of testing them.
>
> When I made my statement, I made the statement that analogous to treatment plants, in sewage treatment plants, we are using the filter. It's the same principle. You have to backwash, and when you do, you have the possibility of disturbing your filtering.
>
> Q. You have never tested raw water going into any of the Tampa Water plants?
>
> A. Not the major treatment—we will be. We are now funded to do this.

Q. Have you tested the finished water which comes out of the Tampa Water Treatment Plant?

A. Not out of Tampa. We have had no funds to so do." (Wellings, Tr. pp. 13292-13293).

C. Effluent Standards Imposed By Illinois Upon Its Own Dischargers Are Less Stringent Than Those Sought To Be Imposed Upon Milwaukee Here; That Is Clear Proof Of What Illinois Really Believes Is Necessary And Reasonable To Protect The Public Health.

In response to a question at oral argument from this Court concerning Illinois' more lenient effluent standards, Mr. Karaganis asserted that "we don't right now have body contact recreation in the Illinois River." That is a partial, and misleading, description of the actual facts. References should be made to Plaintiff's Exhibit 171, the Illinois Pollution Control Board Rules and Regulations. Section 104 of the Rules defines "Primary Contact" waters to be those for recreation, such as swimming and water skiing, or other use involving considerable risk of ingesting water in quantities sufficient to pose a significant health hazard. Sections 301-303 indicate that the Illinois River downstream from the confluence with the Chicago Sanitary and Ship Canal qualifies not only as primary contact water but also as public and food processing water. According to Section 404 of the Rules, it is permissable for treatment plants in such areas to discharge effluent meeting 30/37 standards (for plants of population service of less than 10,000) or 20/25 standards (for plants with population service of greater than 10,000 where dilution ratio is better than 5:1). The uniform coliform standard under Rule 405 is a maximum of 400 fecal coliforms per 100 ml.

Mr. Karaganis further stated without record support in response to this Court's questions that removal of ammonia was required by the State of Illinois for all plants that have changed their point of discharge from Lake

Michigan to Illinois' rivers. He stated that ammonia removal requires an additional biological process, known as "denitrification," [6] and asserted that this process creates a "different" kind of solid. Mr. Karaganis claimed that treatment plants using the same technology ordered by the lower court could not achieve a 5/5 effluent quality because of the "technological limit" caused by this "different" kind of solid. He contended that no better than a 10/12 standard could be met in that circumstance, ostensibly explaining Illinois' imposition of less stringent discharge requirements upon its own treatment plants than those sought to be imposed upon Milwaukee.

There is no record support for that position and we are advised that there is no meaningful difference in the filterability of solids produced by the ammonia conversion process to which Mr. Karaganis alluded and the solids produced by the process used in Milwaukee. We are also advised that the chlorination effect on a 10/12 effluent which has undergone ammonia conversion is no different than upon a 10/12 effluent which has not undergone ammonia conversion.

In sum, we are advised that there is no technological reason why Illinois could not require its own discharges to meet a 5/5 standard if some genuine public health basis for that standard existed. The effect of chlorine on effluent which has undergone ammonia conversion would be the same as the effect on effluent which has not undergone

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[6] The correct description of the process to which Mr. Karaganis alluded is "nitrification," not "denitrification." The process consists of causing ammonia (which can support weed and algae growth) to be converted into an unobjectionable nitrate compound. Thus nitrogen is not removed. Rather, in those Illinois plants where the process is used there is merely a conversion of one nitrogen compound to another. While there is a "denitrification" process that is sometimes used for a different purpose, the remarks made in this memorandum are equally applicable to the effluent resulting after either process is applied.

that process. Thus, if a 5/5 effluent is actually required to facilitate chlorination with one of those types of effluent, it is required for both types. Conversely, if 10/12 or some lesser requirement will suffice for the Illinois discharges it will certainly suffice for discharges made 25 miles away in Milwaukee. *The plain implication of the relaxed standards which Illinois applies to its own dischargers is that there is no health basis for the greater standards Illinois would impose on Milwaukee.*

Once again, as is indicated in footnote 6, whether the process used by Illinois be nitrification or denitrification, all of the above comments apply. If further evidence on those points is desired, it can be supplied.

D. There Is No Testimony Indicating That A 5/5 Standard Is Necessary To Protect The Health And Welfare Of Illinois Citizens Particularly When The Discharge Source Is A Minimum Of 25 Miles From The Illinois State Line.

The treatment level advocated by Illinois and "desired" by Wellings (Tr.p. 12401) is without foundation. The fact that Illinois does not choose to go to 5/5 in any body of water other than Lake Michigan while providing for effluent standards as high as 30/37 in some at its own waters speaks to the lack of real concern that viruses will pose a problem in Illinois unless a 5/5 is met. The issue of whether or not Milwaukee effluents are diluted before they get to Illinois becomes important and also demonstrates the specious character of the treatment levels advocated by Illinois for Wisconsin point sources. As the uncontradicted record indicates, the nearest discharge point operated by these defendants is the South Shore plant, which is approximately 25 miles from Illinois territorial waters. (Tr. p. 8945) Using variables specified by Illinois' counsel, the dilution ratio for such distance from the South Shore plant was calculated to be 1 to 149. Using more realistic—but nonetheless conservative—variables, significantly higher di-

lution ratios are obtained. (Tr. pp. 8939-8940).[7] Certainly any standard imposed on the defendants in this case ought to take such a substantial dilution factor into consideration, even disregarding sedimentation, predation, and the other factors that would potentially have an adverse impact on viral concentration by the time any effluent could reach Illinois.

Taking the dilution ratio into account, even the 30/30 standard imposed by the DNR would result in parcels of water entering Illinois having BOD and suspended solids concentration levels far less than even the 5/5 standard that Illinois claims here to be required for the safety of Illinois citizens. This point is particularly noteworthy in view of the fact that Illinois, except in a very few instances, does not even require its own citizens making discharges directly into Illinois waters to meet the 5/5 standard urged here.

Illinois divides its waters into two categories: (1) those which it wishes to maintain for general public use, such as swimming and water supply use; and (2) those in which it does not allow general recreation or allow the water to be used as a drinking water source. (Pl. Ex. 171)

The first use is designated as primary contact, the second as secondary contact. "Primary contact" means any recreational or other water use in which there is prolonged and intimate contact with the water involving considerable risk of ingesting waters in quantities sufficient to pose a significant health hazard, such as swimming and water skiing. "Secondary contact" means any recreational or other water use in which contact with the water is either incidental or accidental and in which the probability of ingest-

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[7] Low dilution ratios found in the early parts of the trial transcript relate to CSO and storm water run-off from the Milwaukee River as distinguished from sewage plant discharges which experience much higher dilution ratios in the lake.

ing appreciable quantities of water is minimal, such as fishing, commercial and recreational boating, and any limited contact incident to shoreline activity. (Pl. Ex. 171 p.5, Ill. Poll. Control Bd. Rules & Reg., Ch. 3: Water Poll.)

A *water* of the state meets the primary contact definition when the water meets what Illinois terms general standards set forth on pages 9-14 of plaintiff's exhibit 171. Note that this is a *water quality* standard, that is, the Illinois water *after* it receives all effluent discharges (both point and non-point sources) must meet that standard. The only direct bacterial standard for Illinois "primary contact water" is set forth in Section 303(g) of the section entitled "General Standards" at page 10:

> "(g) Based on a minimum of five samples over not more than a 30-day period, fecal coliforms (STORET number—31616) shall not exceed a geometric mean of 200 per 100 ml., nor shall more than 10% of the samples during any 30-day period, exceed 400 per 100 ml." (Pl. Ex. 171, Part II, Water Quality Standards, Sec. 203(g), p. 10)

Thus, Illinois permits a fecal coliform count *in* its primary contact waters far in excess of what the lower court imposed as an upper limit on Milwaukee's *discharges*! It should also be noted that not only does Illinois place such liberal limits on its own water quality, it does so in terms of a *geometric mean*. Contrary to the assertions of counsel for Illinois at oral argument before this Court, a geometric mean cannot be less than the lowest number encountered. A geometric mean is defined as the *nth* root of the product of n positive numbers. That definition precludes a mean less than the lowest number encountered.

The effluent standards which Illinois requires of its own municipalities are set forth in Part IV of plaintiffs' exhibit 171. They include, among other parameters, BOD_5, suspended solids, bacteria, and phosphorus. The only standard associated with bacteria found in Section 405 follows:

> "Bacteria. No effluent governed by this part shall exceed 400 fecal coliforms per 100 ml. after July 31, 1972 except that effluent discharges to the Ohio and Mississippi Rivers shall meet this requirement by December 31, 1973." (Pl. Ex. 171, p. 25)

At Section 407, there is a phosphorus limitation for discharges to the Lake Michigan Basin of 1 mg. per liter after December 1, 1971. This is the same standard required of the plaintiffs through the State of Wisconsin discharge permits. (Pl. Ex. 171, p. 26)

At Section 404(h) the State of Illinois specifically allows up to 5% of the samples collected to exceed by 2.5 times the numerical limits prescribed by the rule (Pl. Ex. 171, p. 25). This means that for 5% of the time or 1½ days per month, Illinois permits up to 25/30 even in those areas it nominally limits with its 10/12 standard for BOD and suspended solids. This is in stark contrast to the lower court's requirement that defendants' discharges *never* exceed a 10/10 standard (A-Ap. p. 7).

Notably missing from the Illinois' requirements, which are aimed at protecting the health and safety of its own citizens, is any virus limitation.

For further discussion of Illinois' undisputedly less stringent discharge limits, and related legal principles, we refer the court to pages 4-12 of the City of Milwaukee's original brief herein.

E. Illinois Regulations Permit Sewage Overflows Into Lake Michigan Which Do Not Even Meet A 30/30 Secondary Standard, Much Less The More Stringent Standards, Sought To Be Imposed Upon Milwaukee Here; That Is Clear Proof Of What Illinois Really Believes Is Necessary And Reasonable To Protect The Public Health.

Section 602 of the Illinois regulations specifically allows combined sewer overflows and treatment plant bypasses. (Pl. Ex. 171 pp. 30-31) Discharges from overflows and bypasses do not have to receive secondary treatment, much less advanced waste treatment. (*Id.*)

For example, the City of Waukegan discharges overflows into Lake Michigan:

> "By Mr. Moerke:
>
> Q. Mr. Riddell, what happens if this plant receives more than it can handle?
>
> A. The plant is provided with a relatively large retention basin having a capacity of about 40 million gallons as compared to the nominal plant capacity of about 20 million gallons.
>
> * * *
>
> Our best estimates are that about twice a year at the present time, and reducing to about once a year in the future, the flow will be so great and of such duration there will be some discharge from these basins to the lake.
>
> * * *
>
> Q. There will be times when the plant will—you anticipate bypass to the lake notwithstanding the fact that it has an equalization basin?
>
> A. We anticipate that initially twice a year and ultimately about once a year there will be overflows which have received what is the equivalent of primary—somewhat more than primary treatment. They will have

had approximately ten hours of sedimentation in these basins plus chlorination." (Tr. pp. 13444-13445)

In contrast to what Illinois requires of its own dischargers, it seeks to impose upon Milwaukee a system composed of *complete* elimination of overflows and bypasses without *any* consideration of the cost or availability of federal funds to finance such a system. (A-Ap. pp. 60, 64) This is but another example of the imposition on Milwaukee of a standard of conduct which Illinois does not require of itself or its own citizens.

CONCLUSION

With the filing of this memorandum this Court will have before it: (1) the record; (2) the positions of the parties taken in the original briefs; and, (3) the memorandums filed in response to the May 26, 1978 order.

Faced with this material, with the charges and countercharges of the parties, with the disputes as to what the record establishes, this Court may properly pose the question—How are we to ultimately deal with this case?

The defendants submit that the one analysis of the proceedings below that involves no dispute over what is in the record must lead to reversal. This analysis starts with the legal trueism that in order for plaintiffs to prevail they must have introduced some evidence with respect to the actual state of Lake Michigan water within the jurisdiction of each of the plaintiffs. Lake Michigan is out there; its waters are available for scientific analysis. Testing procedures to prove the existence of the dangers speculated upon by the witnesses are known and available. Yet plaintiffs chose to do no such testing—a choice which the District Court characterized as having been made out of fear over the results (A-Ap. p. 34). Are there viruses in Lake Michigan waters? Are there pathogenic bacteria in Lake Michigan

waters? The best that can be said for the record before this Court is that no one really knows and that the plaintiffs did not prove what was there and did not want to find out for sure.

Is it really too much to require that the plaintiffs come forward with some evidence of actual conditions in the lake? This was the type of evidence required by the Supreme Court when it has had occasion to deal with similar issues. Before a court imposes liability for untold millions of dollars of expense should it not know what the real danger is? Should it not at least require that an attempt be made to determine the existence of these alleged dangers?

Our original brief quoted the lead cases of the Supreme Court of the United States for the proposition that the speculations of experts cannot withstand against known and observable facts before the court. Here all physical tests taken in Lake Michigan negate the existence of pathogens in Illinois waters, and the fact that there has been no outbreak of any water-borne infestions or diseases in Illinois certainly negates any claim that a hazard exists or has existed in the last hundred years that Milwaukee has been discharging effluent to Lake Michigan 25 miles away from Illinois.

Where a party claims that a hazard exists requiring injunctional intervention at hundreds of millions of dollars in cost, and that hazard has existed for a hundred years, the language and logic of the Supreme Court in *North Dakota* v. *Minnesota*, 263 U.S. 344, 385-388 (1923) should put an end to the controversy:

> "It is difficult for a court to decide issues of fact upon which experts equal in number and standing differ flatly, and when their conclusions rest on estimates upon the correctness of which the court, without technical knowledge, cannot undertake to pass. In such cases, the court looks about for outstanding facts from

which the lay mind can safely draw inferences as to the probabilities.

* * *

To attribute to such a minor but constant artificial incident a phenomenal effect for two whole summer seasons without a recurrence since is to fly in the face of all reasonable probability. The evidence must be clear and convincing indeed to support such a theory. Instead of that, it is a combination of estimates and conjecture based on no accurate knowledge of the flow of the Mustinka before the ditches were put in, and depending greatly on a hypothetical detaining basin in the so-called Delta zone, existence of which the greater weight of the evidence negates.

* * *

The conclusion we have come to on the main issue of fact—that Minnesota is not responsible for the floods of which complaint is made—makes it unnecessary for us to consider this evidence as to a practical remedy for them, and requires us to leave the opinions and suggestions of the expert engineers for the consideration of the two states in a possible effort by either or both to remedy existing conditions in this basin."

While thousands of pages of transcript and hundreds of exhibits have been adduced, a review of the record as a whole does not establish a clear right to relief such as to cause this Court to reach the necessity of deciding the effect of the Federal statutes and the underlying administrative action upon the federal common law nuisance the plaintiffs' attempt to establish.

As the Supreme Court has repeatedly held, the speculations of experts do not rise above the demonstrated and demonstrable facts. Here the facts are clear. No pathogens have been shown in Illinois waters. No effects of pathogens

have been shown in Illinois. No accelerated eutrophication resulting from defendants' discharges has been shown in either Illinois or Michgan territorial waters. All we have is expert versus expert in a never-ending and inconclusive chain of speculation.

It is respectfully submitted that on this record the Court should reverse and remand with directions to dismiss for failure to prove a federal common law nuisance without reaching the complex legal issues presented by the statutory impact of the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act of 1977 (and their regulatory progency) upon whatever federal common law cause of action may now remain.

In the event, however, that the Court does reach that legal issue, we rely on our briefs previously filed herein for the proposition that the federal courts in determining a case of federal common law nuisance are controlled by the federal statute in the manner and form set out in those briefs. This requires reversal of the trial court possibly with directions to enforce the permit requirements of the permits issued to defendants if this court does not consider the question of enforcement mooted by the stipulated judgment entered by the circuit court of Dane County Wisconsin which judgment was stipulated to under the auspices of the permit-granting authority pursuant to the federal statute.

Respectfully submitted,

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Reply Memorandum of Plaintiff-Appellee State of Illinois to the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 77-2246

PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff-Appellee,*

and

PEOPLE OF THE STATE OF MICHIGAN,
Intervening Plaintiff-Appellee,

v.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Defendants-Appellants.

Appeal of the United States District Court for the Northern District of Illinois, Eastern Division
Hon. John F. Grady, Presiding

REPLY MEMORANDUM OF PLAINTIFF-APPELLEE STATE OF ILLINOIS

Introduction

Whether motivated by excessive zeal or misdirected advocacy, the defendants have attacked the decision of the District Court by a hodgepodge of thinly disguised ploys. The defendants' responsive memorandum:

1. either knowingly or negligently misstates the law;
2. deliberately misstates the facts; and
3. engages in unwarranted and unjustified attacks on the qualifications of plaintiff's experts.

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Indeed, the entire responsive memorandum represents a step backward by defendants. At oral argument on inquiry by the Court, the defendants' counsel acknowledged that viruses and other pathogens are discharged by Milwaukee into Lake Michigan.[1] In their responsive memorandum, defendants defiantly deny that human pathogens even reach Lake Michigan at Milwaukee!

Plaintiff State of Illinois will not belabor this Court with an extensive analysis of all of the errors contained in defendants' memorandum. The length of the record makes such a task prohibitive. But the State does submit this brief checklist of corrections to assist the Court in its deliberation.

I

The Defendants Either Knowingly Or Negligently Misstated The Law.

Defendants string cite a series of cases which purportedly support the black letter proposition that "what is authorized by statute or license cannot be a public nuisance." (Def. Mem. pp. 5-6.) Plaintiff has no quarrel with the general proposition that the legislature, if it so desires, can authorize operation of a common law nuisance.[2] But the same black letter source cited by defendants expressly cautions that such authorization must be "clear and unquestionable" (Am. Jur.2d Nuisances § 231.) Moreover, a careful examination of the cases cited by defendants establishes that most jurisdictions—including Illinois and Wis-

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[1] "What we have is the normal spectrum of sewage. That normal spectrum of sewage will contain the various kinds of viruses."

[2] There is some question whether the Illinois legislature could restrict the power of the Attorney General to seek abatement of common law nuisances, since the legislature cannot remove powers which existed at common law. But we will accept—for purposes of this argument only—the proposition that the legislature could do so if it desired.

consin—would not allow an administrative license to bar an action for public nuisance.

For example, defendants attempt to distinguish *Costas* v. *City of Fond du Lac*[3]—which rejected a defense of compliance with administrative requirements—as a private nuisance case not applicable to public nuisance actions. But defendants ignore the subsequent decision in *State* v. *Dairyland Power Cooperative,* 52 Wisc. 2d 45, 187 N.W.2d 878 (1971). There, the Supreme Court expressly rejected a claim that the public nuisance powers of the Attorney General had been curtailed by the creation of a state administrative agency with powers over pollution control. Moreover, in upholding the public nuisance authority of the Attorney General, the Wisconsin Supreme Court decision in *Dairyland Power* cited the *Costas* decision as authority.

Defendants also cite *People ex rel. Scott* v. *Continental Can Co.,* 28 Ill. App. 3d 1004, 329 N.E.2d 362 (1st Dist. 1975), for the proposition that compliance with an administrative license bars a nuisance action as a matter of law. There was no such holding or even dictum in the *Continental Can* case. The *Continental Can* decision correctly held that where the plaintiff offers no evidence of nuisance and rests solely on the pleadings, summary judgment may be entered on the basis of a sworn deposition showing compliance with the permit. The plaintiff put on no evidence whatsoever, and the Court held:

> "Plaintiff did not file any responsive pleadings or counteraffidavits. Consequently, plaintiff's unverified complaint, alleging on information and belief that the defendant was polluting the air and creating a public nuisance by emitting malodorous fumes into the atmosphere, was insufficient to raise a triable issue of fact."
>
> 329 N.E.2d at 364

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[3] 24 Wisc. 2d 409, 129 N.W.2d 217 (1964).

Thus, *Continental Can* does not support defendants' claim that compliance with administrative requirements is a legal bar to a nuisance action.

Indeed, two Illinois decisions have expressly upheld the right of municipal or state authorities to bring nuisance or nuisance-style actions despite so-called "comprehensive" state or federal administrative schemes. *Metropolitan Sanitary District* v. *United States Steel Corp.*, 30 Ill. App. 3d 360, 332 N.E.2d 426 (1st Dist. 1975); *People ex rel. Scott* v. *United States Steel Corp.*, 40 Ill. App. 3d 607, 352 N.E.2d 225 (1st Dist. 1976). While the holding of these cases relates to the doctrine of primary jurisdiction,[4] the decisions clearly emphasize the intent of the Illinois legislature to allow the Attorney General to proceed independent of administrative action:

> "It is equally clear that the Illinois legislature did not intend for the Attorney General to be precluded from seeking judicial relief merely because of the pendency of administrative action. Ill.Rev.Stat. 1975, ch. 14, par. 12, unequivocally states: '. . . The Attorney General has the power and authority, notwithstanding and regardless of any proceeding instituted or to be instituted by or before the Environmental Protection Agency, Pollution Control Board or any other administrative agency, to prevent air, land or water pollution

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[4] Over the years, U.S. Steel Corporation has raised numerous related legal arguments seeking to use the federal or state administrative procedures as a bar to nuisance prosecutions. At various times, these same basic arguments have masqueraded as the exhaustion doctrine, the preemption doctrine, the primary jurisdiction doctrine, the irreconcilable conflict argument, and a host of related legal arguments based on the same facts—the existence of a lenient state or federal administrative scheme substantially less stringent than the remedies sought by the nuisance actions. *See also, Metropolitan Sanitary District* v. *United States Steel Corp.*, 41 Ill.2d 440, 243 N.E.2d 249 (1968); *United States ex rel. Scott* v. *United States Steel Corp.*, 356 F.Supp. 556 (N.D. Ill. 1973).

within this State by commencing an action or proceeding in the circuit court of any county in which such pollution has been, or is about to be, caused or has occurred, in order to have such pollution stopped or prevented either by mandamus or injunction. . . .'"

People ex rel. Scott v. *United States Steel Corp., supra,* 352 N.E.2d at 228

As in their erroneous recitation of Wisconsin and Illinois law on the subject, defendants misconstrue Pennsylvania law as well. Defendants cite a Pennsylvania air pollution decision, *Commonwealth* v. *Glen Alden Corp.,* 418 Pa. 57, 210 A.2d 256 (1965), as authority that the existence of a statutorily created administrative process bars a public nuisance action. But defendants fail to point out the significant difference between the *Glen Alden* air pollution case and the water pollution decision in *Commonwealth ex rel. Shumaker* v. *New York and Pa. Co.,* 367 Pa. 40, 79 A.2d 439 (1951). There, the Pennsylvania Supreme Court expressly held a public nuisance action to abate water pollution was *not* barred by the statutory administrative scheme.

The *Glen Alden* decision distinguished *Shumaker* on the grounds that the Pennsylvania water pollution statute—in terms almost identical to the savings provision of § 505 (e) of the Federal Water Pollution Control Act—expressly preserved pre-existing rights:

"The provision of the Pure Streams Act referred to and upon which Shumaker was based provides:

'It is hereby declared to be the purpose of this act to provide additional and cumulative remedies to abate the pollution of the waters of this Commonwealth, and nothing in this act contained shall in any way abridge or alter rights of action or remedies now or hereafter existing in equity, or under common law or statutory law, criminal or civil, nor shall any provision in this act, or the granting of any

> permit under this act, or any act done by virtue of this act, be construed as estopping the Commonwealth, persons or municipalities, in the exercise of their rights under the common law or decisional law or in equity, from proceeding in courts of law or equity to suppress nuisances, or to abate any pollution now or hereafter existing, or enforce common law or statutory rights.' Act of June 22, 1937, P.L. 1987, § 701, 35 P.S. § 691.701.
>
> "No such provision appears in the Air Pollution Control Act. Accordingly, the Shumaker case is not apposite. Moreover, the absence of such a provision, in light of the similarity of the objects of the two statutes, is a further indication that the Legislature did not desire a dual system of dealing with air pollution."
>
> 210 A.2d at 259-60

Given the existence of savings provisions virtually identical in substance to the *Shumaker* language in both federal and state[5] legislation, it is clear that the Pennsylvania courts would follow the Wisconsin and Illinois courts in holding that a nuisance action was not barred.[6]

Plaintiff could continue with an extended analysis of the other decisions cited by defendants. However, almost all of these cases have as their underpinnings either a fine point of state law or a rote recitation of the black letter rule which provides little further illumination of the issue.

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[5] Beyond the express reservation of Attorney General's powers in Ch. 15 Ill. Rev. Stat. §§ 11, 12, the Illinois Environmental Protection Act also expressly reserves such rights:

> "No existing civil or criminal remedy for any wrongful action shall be excluded or impaired by this Act." Ch. 111½ Ill. Rev. Stat. § 1045.

[6] Indeed, as the *Dairyland Power* decision indicates, Wisconsin would likely reject a repeal by implication argument even if no savings provision remained.

The one exception is the *Jones Falls* decision;[7] and that case—rather than provide insight into the issue—illustrates the logical conundrum of defendants' argument. Defendants argue that:

1. the federal common law nuisance action precludes actions brought under state law;[8]

2. the federal common law of nuisance must find its definition in the statutory scheme created by the Federal Water Pollution Control Act.

If the federal common law of nuisance bars state statutory and common law nuisance actions and yet has its roots in the federal statute, defendants cannot reconcile the explicit savings provision of the statute—§ 505(e) [9]—with the claim of bar. Indeed, the Fourth Circuit in *Jones Falls* held that § 505(e) is an express recognition of the continuing preservation of state common law nuisance actions:

> "Congress recognized the continuing validity of state common law nuisance actions in subsection 1365(e) of the Amendments."
>
> 539 F.2d at 1009, n.9

It makes little difference to the question of liability and remedy if this case is decided under the aegis of federal common law, state common law or state statute. The courts and Congress have recognized the continuing vitality of

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[7] *Committee for Consideration of Jones Falls Sewage System* v. *Train*, 539 F.2d 1006 (4th Cir. 1976).

[8] *E.g.*, counts II and III of the Complaint in the instant case.

[9] "(e) Nothing in this section shall restrict any right which any person (or class or persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." 33 U.S.C. § 1365(e).

each remedy. *See, e.g., Ohio* v. *Wyandotte Chemical Corp.*, 401 U.S. 493 (1971). The plaintiff need not posit a rationale for the inconsistencies inherent in defendants' "common law of the statute" argument. However, to assist the Court in its articulation of the relationship between the various available remedies, plaintiff suggests the following rationale.

Defendants have contended that the federal common law should bar individualized actions resulting in individualized requirements because the federal common law exists to provide uniformity. But neither the law of nuisance or the Federal Water Pollution Control Act demand uniformity regarding pollution control requirements. Indeed, both the Supreme Court in dealing with federal common law nuisance and the statute recognize the need for individually tailored pollution control requirements to meet local environmental needs.

For example, on the same day that the Court decided *Illinois* v. *Milwaukee,* Justice Douglas wrote the opinion in *Washington* v. *General Motors Corp.*, 406 U.S. 109 (1972). There, the Court held that the states could initiate federal common law actions to abate air pollution. 406 U.S. at 112, n. 3. The federal common law nuisance action existed in the face of the then existing Clean Air Act of 1970, 42 U.S.C. § 1857 *et seq.*, a statute whose structure and administrative scheme served as the basis for the 1972 Federal Water Pollution Control Act Amendments. Justice Douglas also took note of the savings provisions of 42 U.S.C. § 1857h-2, which is virtually identical with § 505(e) of the subsequently passed water amendments:

> "Moreover, citizens, States, and local governments may initiate actions to enforce compliance with federal standards *and to enforce other statutory and common-law rights.* 42 U.S.C. § 1857h-2."
>
> 406 U.S. at 115, n.4 (emphasis added)

Justice Douglas went on to explictly recognize the need for individually tailored pollution control requirements to meet local environmental needs.

> ". . . [M]easures which might be adequate to deal with pollution in a city such as San Francisco, might be grossly inadequate in a city such as Phoenix, where geographical and meteorological conditions trap aerosols and particulates.
>
> "As a matter of law as well as practical necessity corrective remedies for air pollution, therefore, necessarily must be considered in the context of localized situations. We conclude that the causes should be heard in the appropriate federal district courts."
>
> 406 U.S. at 116 (footnotes omitted)

The Federal Water Pollution Control Act also recognizes the need for individualized pollution control requirements. The so-called secondary treatment standard of "30/30" established pursuant to § 301(b)(1)(B) is a national minimum standard which has no relationship to local water quality needs. Even defendants acknowledge this failure of the 30/30 to address water quality.

> "So I think it is rather obvious, at least to me that 30/30 has nothing to do with water quality." [10]
>
> ". . . [T]he problem is that when you get into the water quality issue, it is a site specific issue. One cannot administrate a law on a nationwide basis on water quality. One has to begin to then research based on the local conditions in order to obtain the necessary information that might relate discharge standards to water quality." [11]

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[10] Testimony of William Katz, the defendants' director of research. (TR 11214).

[11] *Id.*, at TR 11215-16.

Tailoring pollution control requirements to individual water quality needs is typically an *ad hoc* process addressed to a specific water body and specific dischargers. The legal mechanisms for such tailoring are legion.

1. The EPA Administrator can adopt "water quality related effluent limitations" under § 302 of the FWPCA, 33 U.S.C. § 1312.

2. The states can adopt maximum daily loads of pollutants to be discharged pursuant to § 303(d) and make point source allocations under 40 C.F.R. § 131.11.

3. The states can adopt non-water quality related "technology forcing" effluent limits under the retained authority of § 510 of the Act. See *United States Steel Corp.* v. *Train,* 556 F.2d 822, 830 (7th Cir. 1977).

4. The states, municipalities and private individuals can seek the imposition of discharge limits necessary to protect water quality through federal or state common law and statutory remedies.

These remedies are not exclusive and can be pursued on a parallel basis. Such was the case with U.S. Steel Gary Works. The federal EPA and an Illinois state agency pursued water quality related control through the NPDES process. The Illinois Attorney General and the Metropolitan Sanitary District pursued stricter discharge limits by public nuisance actions or analogous nuisance oriented statutes under state law. In these cases, compliance with the most stringent standard imposed typically guarantees automatic compliance with the less stringent standards.

> "Although defendant argues that the agency proceedings are concerned with treatment of discharges, while the Attorney General seeks a recycle program to all but eliminate such discharges, defendant is not placed in the position of being unable to comply simultaneously with requirements of the NPDES permit and any

possible order of the circut court. If the circuit court should ultimately order abatement measures against U.S. Steel more stringent than those set by the NPDES permit, compliance with the state standard would, by defendant's own admission, satisfy the federal requirements."

People ex rel. Scott v. *United States Steel Corp., supra,* 352 N.E.2d at 229

Thus, it is the individually tailored pollution control requirement necessary to protect a given water body—in this case Lake Michigan—rather than the mechanical application of the national minimum discharge standard which must be developed. A common law nuisance trial or an action based on statutory prevention of a health hazard with full adversarial examination of conflicting positions is an excellent alternative means to establish such requirements.

II

Defendants Have Either Negligently Or Deliberately Misstated The Facts.

Plaintiff State of Illinois will highlight the major errors in defendants' citation of facts. Since the outline on pages 15-16 of defendants' memorandum does not follow the order of its citations to the record, plaintiff's reply will follow the points made in the text of defendants' memorandum, beginning at page 17.

1. Defendants' attempt to hide behind a make-weight distinction between conservative and non-conservative pollutants is pure hokum. (Def. Mem. pp. 17-25). This conservative versus non-conservative argument is another variant of the discredited claim in their reply brief that no witness testified that pollutants from Milwaukee, as opposed

to pure water, ever reached the state line (pp. 4-5 of defendants' joint reply brief).[12]

Having been exposed on the water versus pollutants argument, defendants now claim that, while Milwaukee pollutants may reach Illinois waters, the only ones that reach Illinois waters are "conservative" pollutants, not "non-conservative" pollutants (pollutants which degrade or die off) like bacteria and viruses. Defendants now claim that their experts were not talking about bacteria and viruses reaching Illinois, but simply about "conservative pollutants."

Defendants are dead wrong. Neither the trial court, nor plaintiff's witness Csanady, nor defendants' witnesses Pritchard and Carter based their conclusions on so-called "conservative" pollutants, as opposed to "non-conservative" bacteria and viruses. All of the experts followed what was essentially a multi-stage process of empirical analysis:

(a) Did the currents persist long enough and at sufficient speeds to transport effluent the 37 miles from the Milwaukee Harbor mouth to the Illinois line.[13]

(b) Recognizing that bacteria have growth and die-off characteristics, the experts used various "die-off" rates to calculate the number of bacteria surviving in Illinois

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[12] As plaintiff's supplemental memorandum (p. 60) sets forth, all the experts acknowledged that pollutants or effluents—as opposed to mere water—would reach the state line. Indeed, Carter's correspondence to defendants is replete with references to Milwaukee's effluent reaching the state line. In Defendants' Exhibit 905, Carter lists what are "Southerly flows sufficiently long and/or strong to transport *effluent from Milwaukee* to Illinois" (emphasis added). He states, "I conclude that spring is the most likely time for *Milwaukee effluent* to reach Illinois waters" (emphasis added).

[13] The frequency estimates of transport of 4 times (defendants) to 12 times (plaintiff)—all of which said the frequency could vary were based on 37 miles. Of necessity the lesser 25 mile distance from defendants' South Shore plant would involve greater frequencies.

> waters. The dispute was not whether there was so-called "die-off" of bacteria; the dispute was the degree of die-off and the resultant survival of bacteria in Illinois waters. Indeed, the whole thrust of Carter's testimony revolved around the transport and die-off of bacteria and the remaining bacteria in Illinois waters. (See Def. Ex. 1164, TR 8912-8932).

Nor was Pritchard dealing with "conservative" pollutants when he acknowledged the transport of substances discharged by Milwaukee. The colloquy between plaintiff's counsel and Pritchard at TR 7175-7176 deals with both "conservative" and "non-conservative" pollutants.

Carter and Pritchard, working as a firm called Hydrocon, had calculated that in 1973 there were four occasions when effluent from Milwaukee would have reached the state line, and the analysis was performed with respect to bacteria. (See Def. Ex. 905 and Def. Ex. 1064.) These four occasions involved analysis of only those situations where there were no interruptions or reversals in the southward flow of the current—so-called "single phase" excursions. The data analysis did not include situations where the current reversed direction temporarily and then after a time resumed a southerly flow.

As Pritchard explained at TR 7175, he did not look at such occasions because his analysis dealt with pollutants that die off, i.e. bacteria. At TR 7175-7176, Pritchard acknowledges that, if one were to deal with pollutants other than coliform bacteria—i.e., pollutants that do not die off (e.g., phosphorus)—one would want to look at those instances where there was a temporary reversal or interruption and where southerly flow than resumes. Pritchard acknowledged this difference between the four occasions of single-phase transport of bacteria and the more frequent transport of conservative pollutants at TR 7177:

> "Q. Doctor, with respect to a pollutant which isn't going to degrade, the time at which that pollutant or

> the number of times, number of excursions, that that pollutant would come down, under your experiments now, would be greater than the four times, isn't that right?
>
> "A. I would presume so, yes, sir."

Thus, we have a situation where defendants' own experts acknowledge movement of bacteria or pollutants subject to die-off on at least four separate single-phase transport excursions (Def. Ex. 905), and the likelihood of more frequent transport of non-degradable pollutants in current reversal situations.

The basic dispute between the experts was the rate of die-off of the bacterial pathogens.[14] Plaintiff's die-off evidence was based on the testimony of Edwin Geldreich, a nationally known bacteriologist, who testified that bacterial die-off for 90% removal ranges from four to eight days (TR 3085). Dr. Csanady used a die-off curve developed from several studies on survival of bacteria in Lake Michigan waters. These studies were referenced in one of defendants' expert's reports and that report stated:

> "Thus it is possible that it can take anywhere from 2 to 12 days for 90% of a coliform population to die off in Lake Michigan."
>
> Def. Ex. 85, p. 75

Defendants chose to ignore these test results and perform their own test. The test was performed by Mr. Carter who, while an undisputed expert in currents and transport, admitted to having no expertise in bacteriology (TR 8934).

The test methodology was severely criticized by Dr. Walter Mack, an eminent bacteriologist (TR 13480-13485).

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[14] Everyone acknowledges the much longer survival of viral pathogens.

Without going into great detail as to the test's technical deficiencies, Carter released bacteria on the bottom of the lake in 24 feet of water. Despite the release of the bacteria on the bottom in 24 feet of water, defendants chose to sample for bacteria in only the top three feet of water! Carter never measured the bacteria remaining in the remaining 21 feet of water depth! The trial court quite properly rejected defendants' "test" and instead relied on the testimony of Geldreich and on the other bacterial survival tests in Lake Michigan.

2. Defendants' list of reasons why pathogens will not survive to reach Illinois is specious. Defendants list four arguments why pathogens will not survive the transport to Illinois: alleged sedimentation, predation, biological inactivation, and ultraviolet radiation. A quick examination of these arguments discloses their inherent weaknesses.

Defendants would have this Court believe that these forces eagerly lie in wait in Lake Michigan to destroy the billions of viruses and bacteria discharged by Milwaukee. The evidence and common sense indicate otherwise.

(a) Sedimentation. Defendants would have this Court believe that sewage all settles in Milwaukee Harbor and never reaches Lake Michigan (Def. Mem. pp. 33-35), but hard evidence contradicts this claim. The Milwaukee Health Department takes daily tests of the water leaving the harbor at the various harbor openings. At the main harbor entrance those test results—after the water has passed through the harbor—show water with fecal coliform counts as high as 32,000 to 37,000 per 100 milliliters (Plaintiff's Exhibits 147, 148). Defendants' laboratory bacteriologists and Geldreich have stated that the test used by the City, the "MF" method, dramatically understates the fecal coliform count (Def. Ex. 204). Geldreich estimated that the numbers done by the more accurate "MPN" method would be 10 to 100 times higher (TR 3080). Plaintiff emphasizes that these tests are taken at the point where the water

leaves the harbor after all of the defendants' so-called "purification" takes place.

The highly contaminated flow from the harbor into Lake Michigan is further evidenced by defendants' water treatment plant records. These plant intakes sit in Lake Michigan, and the Howard intake sits about two and one-half miles out into the Lake in the path of the harbor discharges. Defendants' witness Zanoni wrote of the Howard plant:

> "Howard raw water much poorer quality than Linnwood Avenue. They get the flow from harbor and Jones Island treatment plant especially when bypassing. They use much more chlorine than Linnwood."
>
> Def. Ex. 201, TR 5474

In addition to the harbor discharges into the Lake, the South Shore Plant—which discharges directly into the Lake—has recorded fecal coliform discharges of 230 per 100 milliliters (MPN method) (Def. Ex. 96). So, despite, all the so-called claims of "purification" by sedimentation, enormous quantities of pathogens get into Lake Michigan.

Plaintiff also asks the Court to call on its own common sense. Of course, there are some sewage particles that will settle,[15] but much human fecal matter consists of light materials with a specific gravity close to that of water which will float along suspended in the water. As defendants' witness Katz testified as to why fecal material would not readily settle under quiescent conditions:

> "As fecal material, I would say that since it has a specific gravity close to water, that would be one of the last things that would deposit as a deposit. O.K ?"
>
> TR 11400

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[15] Plaintiff has previously pointed out the hazard of resuspension.

Defendants' witness Carter testified:

"Q. ". . . So lumps and debris can remain in suspension for a long period of time.

"A. If their density and size is such that they will, yes."

TR 8790

(b) Bacterial inactivation. The only evidence that defendants put in with respect to bacterial destruction of virus is the single laboratory experiment by Dr. Cliver with the water of Lake Wingra in Wisconsin. Cliver used special lab virus which, unlike virus in sewage, was not protected by solids.[16] On cross-examination, Cliver candidly acknowledged that he had no concrete or quantitative evidence on biological inactivation and that temperature could have had a major effect on the inactivation. Cliver stated:

"Q. Would you agree with me that you cannot say on the basis of quantitative measured evidence that the degree of, in your term, inactivation was caused by bacterial inactivation?

"A. I agree."

TR 10311

* * *

"I didn't quibble about the use of biological inactivation in this context, but let's just say that we supposed that loss of infectivity in that lake would be comparable to the rate of loss of infectivity in this lake. Whether it is biological or a temperature phenomena is immaterial.

"I don't know about sedimentation. I think there is reason to believe that there will be some inactivation.

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[16] The entire lab methodology of the Cliver experiment was critiqued by Dr. Mack (TR 13486-13487).

Whether it is biological or physical in nature at this point I think is of no great consequence.

"Q. Would it be fair to say that your position is that you are not certain whether it would be biological or temperature, that it could be one or both, but your opinion is that it would occur in Lake Michigan like it occurred in your lake sample in Defendants' Exhibit 38?

"A. Yes."

TR 10312

Cliver went on to say that, with the cold temperature of Lake Michigan, inactivation could take months to occur:

"THE COURT: Did I understand you correctly that during the winter months you believe that the inactivation of enteroviruses in the lake could take months to occur?

"THE WITNESS: That's correct."

TR 10315

Cliver also acknowledged that he had performed tests to see whether the bacteria in sewage inactivated virus, and he learned that sewage bacteria did not inactivate virus (TR 10327).

In short, the whole question of so-called bacterial inactivation of virus is conjectural at best. Moreover, the defendants' witness on this subject candidly acknowledged that viruses could survive for months in cold Lake Michigan waters.

(c) Bacterial predation. There is no quantitative or qualitative evidence of bacterial predation in Lake Michigan waters. Again, the plaintiff asks the Court to approach the evidence from a common-sense perspective.

In a desperate attempt to find some magic solution, defendants seek to shape the testimony of Dr. Otto, a fisheries biologist, into a major defense against pathogenic pollution. In so doing they mix apples and oranges of the animal life of the Lake. There is not dispute that bottom-dwelling organisms of a certain kind, i.e. oligochaetes (worms), will consume sewage particles. But Defendants' Exhibit 1321 shows that oligochaete worms are in significant abundance only in the Milwaukee Harbor. Further, Defendants' Exhibit 1321 only gives population of bottom organisms—so-called "macrobenthos." Defendants offered no evidence as to the quantities and species of zooplankton in the Lake. It is the zooplankton which are the organisms in the water column—not the macrobenthos (TR 10085). Moreover, as Dr. Otto pointed out, some zooplankton only eat plant life (phytoplankton); others only eat other zooplankton; and others are omnivorous (TR 10086). No evidence exists as to the species abundance or distribution of zooplankton in the Lake.

In fairness to Dr. Otto, defendants are trying to squeeze too much from his testimony. Otto testified primarily regarding the biological evidence of macrobenthos as it related to water quality.[17] He did not get into pathogenic removal.

Had Otto really testified as to predator removal of pathogens, he would have been cross-examined regarding his statements in Plaintiff's Exhibit 193, which was received in evidence without objection (TR 3726-3727) but stricken at the end of trial over plaintiff's objection.

Plaintiff's Exhibit 193 is Otto's report to defendants with regard to sewage effects on fish. In that exhibit, Otto points out that bacteria are not destroyed by predation, but may indeed infect the predator which can in turn infect

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[17] His testimony was rebutted by Dr. Alfred Beeton, who had supervised much of the benthic and eutrophication studies which have been done on Lake Michigan.

man. Thus, fish which consume bacteria may then become free swimming and independent sources of infection.

(d) Ultraviolet radiation. Nothing more need be said about the last excuse of the defendants—ultraviolet radiation—than to quote defendants' witness Cliver:

> "A. He asked me if there was any possibility that ultraviolet radiation would activate the virus, and I said yes. In the very superficial layer of water in the top there would be some of that.
>
> "Q. But you are not postulating that ultraviolet irradiation is going to have any significant effect on viruses within the water column, are you?
>
> "A. No."
>
> TR 10311

3. Defendants again raise the claim that the pollutants from Milwaukee would never get close to shore—beaches or water intakes. (Def. Mem. pp. 42-46.)

Both expert testimony and test data show that Milwaukee pollutants can and do move on shore. First, Milwaukee's health department records show that Milwaukee's fecal discharges move in and contaminate its own beaches (Def. Ex. 146-149). Second, dye studies by defendants' witness Kupfer show that the pollutant slug will stay offshore or move onshore in highly variable fashion (Pl. Ex. 221-223).

Defendants' witness Pritchard testified that, while his experiments showed a pollutant plume being transported directly to the beach (advection) only once, fecal contaminants could get to the beach by a process called lateral diffusion (TR 6564). Csanady testified:

> "Q. Are there situations that could occur where this peak concentration could move in on the shore?
>
> "A. Yes, and there would be situations where the slug meanders on shore and hits areas closer to shore."
>
> TR 2025

Edwin Geldreich of the Environmental Protection Agency testified:

> "A. I have had the opportunity to look at the bathing beach data from the Evanston-North Shore for the last ten years. Every year I get a summary of all the data, individual dates and all the data that has been collected on those dates during the bathing season.
>
> "At the same time the data is supplied to me on bacteriology, there is also supplied to me various weather conditions and notes about which way the wind is blowing and whether there has been storm periods and so on.
>
> "It is quite obvious that there are occasions when the kind, when it is blowing from the northeast, is pushing pollution on those beaches."
>
> TR 3111

Further, there is evidence of fecal contamination on Illinois beaches. There are repeated violations of Illinois standards for fecal coliform at Lake County beaches (Pl. Ex. 172, 173). Furthermore, defendants have misstated Illinois' fecal standards. The Illinois Pollution Control Board has set a standard of *20* fecal coliform (geometric mean), not 200 as stated by defendants (IPCB Rule 206(d), Lake Michigan). The Illinois Department of Health prohibits any two consecutive single fecal test results over 100 per 100 milliliters. The Lake County beach records show repeated violations of these standards.

4. The defendants' arguments that additional tests should be performed is a red herring. Of course, some additional testing can always be performed, but the lack of additional tests does not obviate the overwhelming mass of evidence already in the record. The defendants want scientific evidence beyond a shadow of a doubt, but such certainty is neither possible nor necessary. The proper ap-

proach to the scientific evidence in public health cases was articulated by Judge Wright in *Ethyl Corp.* v. *EPA*, 541 F.2d 1 (D.C. Cir. 1976):

> "Petitioners demand sole reliance on *scientific* facts, on evidence that reputable scientific techniques certify as certain. Typically, a scientist will not so certify evidence unless the probability of error, by standard statistical measurement, is less than 5%. That is, scientific fact is at least 95% certain.
>
> "Such certainty has never characterized the judicial or the administrative process. It may be that the 'beyond a reasonable doubt' standard of criminal law demands 95% certainty. *Cf. McGill* v. *United States*, 121 U.S.App.D.C. 179, 185 n.6, 348 F.2d 791, 797 n.6 (1965). But the standard of ordinary civil litigation, a preponderance of the evidence, demands only 51% certainty. A jury may weigh conflicting evidence and certify as adjudicative (although not scientific) fact that which is believes is more likely than not. Since *Reserve Mining* was adjudicated in court, this standard applied to the court's fact-finding. Inherently, such a standard is flexible; inherently, it allows the fact-finder to assess risks, to measure probabilities, to make subjective judgments. Nonetheless, the ultimate finding will be treated, at law, as fact and will be affirmed if based on substantial evidence, or, if made by a judge, not clearly erroneous."
>
> 541 F.2d 1, 28 n.58 (emphasis in original)
>
> "Even scientific 'facts' are not certain, but only theories with high probabilities of validity. Scientists typicaly speak not of certainty, but of probability; they are trained to act on probabilities that statistically constitute 'certainties.' *See generally* T. Kuhn, The Structure of Scientific Revolutions. While awaiting such statistical certainty may constitute the typical mode of scientific behavior, its appropriateness is

questionable in environmental medicine, where regulators seek to prevent harm that often cannot be labeled 'certain' until after it occurs. *See* note 58 *infra.*

"The uncertainty of scientific fact parallels the uncertainty of all fact. In a metaphysical sense, at least, facts are themselves nothing more than risks, or statistical probabilities. *See* D. Hume, A Treatise of Human Nature, bk. 1, pt. III, § 6, at 87 (L.A. Selby-Bigge ed. 1958)."

Id., at 25 n. 52

Perhaps the most egregious dissembling by defendants comes in the area of disease in Illinois caused by enteric (fecal) pathogens. Defendants repeatedly suggest that there was no evidence of enteric disease in Illinois (Def. Mem., p. 16). The record, however, is absolutely clear that Illinois residents are being infected and are suffering from enteric diseases caused by fecal transmission (TR 2217, 13228; Def. Ex. 83).

What cannot be established is the epidemiological link between transmission of the fecal contamination by water or some other route. Contrary to the statements by Dr. Cliver, who was a research virologist and not an epidemiologist, Dr. Wellings and Dr. Melnick testified at length about the epidemiological difficulty of tracking down the source of the virus. (See generally the testimony of Dr. Wellings, TR 13183-13242.) [18]

5. The defendants' critique of the trial judge's order as not being "cost-effective" is spurious. Defendants use the

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[18] And see Plaintiff's Exhibit 236, which was prepared under the supervision of defendants' witness Sproul:

"The true incidence of waterborne disease is very difficult to estimate. Epidemiological techniques are not sensitive enough to detect a low level of transmission by the water route." (p. 14).

term "cost-effective" without ever giving meaning to it. "Cost-effective" is little more than a word game. "Cost-effectiveness" purports to measure the cost of the treatment against the benefit to be obtained. Fundamental to such an analysis is a detailed knowledge of the costs and the benefits.

Interestingly, defendants have never provided the back-up for their cost estimate nor any basis for disputing Gordon Culp's estimate of 59 million dollars, or approximately $2.00 per month per household, for advanced waste treatment. Defendants' witness Zanoni, quoted at length at pp. 71-80 of defendants' memorandum, had no knowledge of costs. His 253 million dollar cost claim was prepared by the defendants' witness Gupta, who was unable to substantiate his cost claims. Indeed, the only source Gupta quoted was a book by Culp and Culp on advanced treatment. Plaintiff then called Gordon Culp, who did an extensive cost analysis to support his 59 million dollar estimate.

The second element of cost-effective measurement is what benefit will be obtained. Such an analysis presumes that a numerical value can be placed on keeping Lake Michigan in a non-degraded state, but defendants admit that a dollar value cannot be placed on the preservation of Lake Michigan:

> "Q. Dr. Katz, can you give a dollar value to the benefit society receives from maintaining Lake Michigan in a non-degraded or undegraded state?
>
> "A. That society receives?
>
> "Q. Yes.
>
> "A. I can't do that, no."
>
> TR 11469

Defendants place most of their cost-effective emphasis on the witness Sproul's opinion that the existing plants

removed 99% of the viruses (Def. Mem., p. 65). They seek to negate the testimony of Dr. Berg and Dr. Wellings that secondary activated sludge plants have spotty virus removal by attacking the methods they use to test sewage. Drs. Berg and Wellings stand in the record as having performed hundreds to thousands of tests on sewage as to influent, primary effluent, secondary effluent and—in Dr. Wellings' case—advanced waste treatment effluent. Defendants, having in pre-trial period classified Dr. Wellings as "indeed an authority on sewage and water-borne viruses," [19] now seek to denigrate her vast testing experience and that of Dr. Berg, a top EPA expert on virus.

Drs. Berg and Wellings testified that, when they found high numbers of solids in activated sludge plant effluent, they found high numbers of viruses. Wellings based her opinion as to the low viral removal efficiency of defendants' plants on the poor solids removal by the plants. On many days there are as many fecal solids leaving the plants as coming in.

Dr. Sproul gave his contrary opinion about viral removal efficiency based on the same operating records of defendants' plants as Dr. Wellings. Only, unlike Dr. Wellings or Dr. Berg, Sproul has never tested any sewage from any sewage plant at any stage for enteric virus:

> "Q. Let's talk about for [*sic*] enteric viruses. You have never tested waste water to determine either the numbers of viruses or the distributive pattern of viruses within that wastewater?
>
> "A. What do you mean by distributive patterns?
>
> "Q. Whether they are evenly dispersed, clumped, or anything else.
>
> "A. That is correct."
>
> TR 10625, 10626

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[19] Plaintiff's Exhibit 117. Indeed, plaintiff learned of Dr. Wellings' expertise through this memo by defendants' plant manager.

Indeed, Sproul published an article contained in Plaintiff's Exhibit 140 which contradicts his court opinion of high viral removal by defendants' plants:

> "Plant scale data for virus removal by the activated sludge process are spotty and often show removals *lower than those in laboratory studies.* . . . Chlorine is an effective virucide in water under proper conditions. For best results, chlorine should be present as hypochlorous acid, and *no suspended solids or turbidity should be present.*"
>
> Pl. Ex. 140, p. 173 (emphasis added)
>
> "These data indicate that for the viruses shown in the table, free chlorine residuals of 1 to 2 mg/l with contact times of 1 to 2 hr would be required for extensive inactivation in waters with pH values of about 7.8."
>
> *Id.*, p. 174
>
> "Most disinfection standards for wastewater treatment plants can be met with combined chlorine residuals; under these standards, it is obvious that *little virus inactivation is obtained.*"
>
> *Id.*, p. 175 (emphasis added)

Sproul's entire court opinion was based on other reported lab studies. As emphasized repeatedly, defendants' discharges are high in solids; a 30/30 standard would allow daily discharges of 100 or more mg/l solids. Defendants' plants now operate to maintain a combined, not a free, chlorine residual. Defendants' plant records show a consistent zero reading on free chlorine by the amperometric method.[20]

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[20] The amperometric method is the more accurate method for measuring free chlorine and is relied upon in preference to the less reliable orthotolodine method (TR 12121-12123).

Finally, defendants cite two EPA studies purporting to show that viruses will not get through water treatment plants (Def. Ex. 3, 34). However, EPA expert Berg testified that the crude viral detection methodology used in those studies gave no assurance that the plants were removing all virus (TR 12077-12083). Berg expressed concern about the solids that got through the water treatment plant in those tests (TR 12081). The authors of Defendants' Exhibit 34 did not bother to test the solids for virus, even though Wellings and others have pointed out that solids are repositories of virus (TR 13264-13265).

6. Defendants again try to argue that Illinois allows more lenient discharge standards for its dischargers. As emphasized, this is not true on Lake Michigan. Moreover, it is not true in the rest of Illinois either. The numerical limits set by Illinois regulations are essentially minimum effluent technology numbers similar to the 30/30 standards [21] set nationally by the EPA. As the national scheme provides, tougher limits may be imposed by *ad hoc* administrative or judicial action where necessary to protect water quality.

Defendants completely ignore Rule 402 which provides for the imposition of these tougher standards:

> "In addition to the other requirements of this Part, no effluent shall, alone or in combination with other sources, cause a violation of any applicable water quality standard. When the Agency finds that a discharge that would comply with effluent standards contained in this Chapter would cause or is causing a violation of water quality standards, the Agency shall take appropriate action under Section 31 or Section 39 of the Act to require the discharge to meet what-

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[21] Defendants attempt to suggest that 30/30 and 5/5 are not really that different. But as the record emphasizes, 5/5 means consistent pathogen destruction; 30/30 is a license to spew billions of pathogens on any given day.

ever effluent limits are necessary to ensure compliance with the water quality standards." [22]

These tougher "water quality related" effluent standards may be imposed by administrative action by the state agency. Alternatively, similar more stringent standards may be imposed by nuisance-type actions brought by the Attorney General. As noted above, the state legislature has expressly given the Attorney General power to seek judicial relief stronger than and independent of requirements of either the State Pollution Control Board or the State Environmental Protection Agency. This independent judicial remedy has been used many times to impose tougher requirements than those required by the administrative agencies.

As stated to the Court, the Attorney General's office is not aware of any direct body contact recreation or water supply use of any water in the State of Illinois where less stringent effluent standards apply. For example, to our knowledge, the Illinois River is not used for either direct body contact recreation or water supply.

If such use were initiated and the Attorney General's office learned that sewage effluent was being discharged so as to bring bacterial and viral pathogens into potential contact with either a public water supply or swimming location, this office would initiate a nuisance action to impose standards of equal stringency to those imposed by the District Court below.

Indeed, as to the solitary once-a-year discharge of Waukegan, the Attorney General is willing to bind the State of Illinois to eliminate that discharge even though the District Court referred to it as *de minimis* next to Milwaukee's.

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[22] Water quality standards include freedom from substances harmful to human health (Rule 203).

Conclusion

For almost fifteen years the Milwaukee defendants have been in administrative and judicial proceedings to presumably clean up their gross pollution of Lake Michigan. For all the legalese bandied about, the fecal pollution of Lake Michigan is greater today than when the proceedings started. Milwaukee had its day—indeed, its months—in court in a scrupulously fair and exhaustive proceeding.

Milwaukee's brief ignored the fact that its own consultant recommended the treatment ordered by the District Court and that other Lake Michigan dischargers (e.g., Gary, East Chicago, Hammond) are being required to meet identical limits. For the sake of Lake Michigan, let the plethora of legal briefs be replaced by a decision of this Court affirming construction of the facilities ordered by the District Court.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the
State of Illinois

By /s/ JOSEPH V. KARAGANIS
Joseph V. Karaganis
Special Assistant Illinois
Attorney General

JOSEPH V. KARAGANIS
KARAGANIS & GAIL LTD.
150 North Wacker Drive
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Joint Memorandum of Defendants-Appellants City of Milwaukee, The Sewerage Commission of the City of Milwaukee and The Metropolitan Sewerage Commission of the County of Milwaukee to the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 77-2246

PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff-Appellee,*

and

PEOPLE OF THE STATE OF MICHIGAN,
Intervening Plaintiff-Appellee,

vs.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Defendants-Appellants.

Appeal of the United States District Court for the Northern District of Illinois, Eastern Division
Honorable John F. Grady, Presiding

JOINT MEMORANDUM OF DEFENDANTS-APPELLANTS CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE

Defendants in all respects reaffirm the statements made and the positions taken in prior submissions to this Court. A lack of response to any particular comment or accusation by Illinois should under no circumstances be taken as agreement, admission or assent thereto. We suggest that the following points remain unanswered by Illinois and are dispositive.

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The *sine qua non* of the judgment before this court on appeal is an action arising under the laws of the United States. 28 U.S.C. § 1331. Without it, neither this court nor the court below has jurisdiction. THIS IS NOT A DIVERSITY CASE AND JURISDICTION CANNOT BE GROUNDED ON THAT BASE!

The *federal* common law of nuisance used by Justice Douglas as the basis of the decision in *Illinois* v. *Milwaukee* that an action alleging interstate pollution arises under the "laws of the United States" was a choice of law preventing resort to state law in this federal form; it is the *federal* common law of nuisance that served as the jurisdictional underpinning. The lower *federal courts* have no jurisdiction to hear cases seeking to abate interstate pollution on the basis of state law.

This court's order of May 28, 1978 directed the appellees to set forth the elements required to be proved to establish a unisance under the *federal* common law. The appellees' original memorandum filed in response to this court's order totally failed to discuss the *federal* common law of nuisance. Instead, it discussed general nuisance concepts under various state and English common law decisions and authorities. In the responsive memorandum filed by appellants, we pointed out this failure by appellees to deal with that central jurisdictional issue. Appellees have now filed a second responsive memorandum which demonstrates that this failure is beyond remedy. The appellees are unmasked. The *federal* common law does not support, and cannot be molded to support, the judgment below.

The bypassing of the jurisdictional issue is most clearly reflected where the appellees' second memorandum states:

> "It makes little difference to the question of liability and remedy for this case to be decided under the aegis of federal common law, *state* common law or *state* statute." (Illinois Memorandum, p. 9, emphasis supplied)

But, there is a difference, and this difference goes to the heart of the authority of lower federal courts to hear and decide interstate pollution claims. Unless the liability and remedy found and imposed by the judgment below is based upon the *federal* common law of nuisance, the choice of law applicable to this case, this court and the district court have no jurisdiction, and, lacking jurisdiction, the judgment must be reversed.

No "rationale" or argument offered by the appellees (see Illinois Memorandum, p. 9) can supply the missing condition to the validity of the judgment below. This action can only be entertained if it is an action arising under the laws of the United States.

Finally, nowhere does Illinois meet the fact pointed out by appellants that, as in the Supreme Court cases of *Missouri* v. *Illinois,* 200 U.S. 496 (1905); *New York* v. *New Jersey,* 256 U.S. 296 (1921); and *North Dakota* v. *Minnesota,* 263 U.S. 344 (1923), the evidence here adduced by plaintiff consists principally of speculations by experts, which was met by counter opinions of equally impressive experts produced by defendants. The evidence of plaintiffs was not actual data from tests of the waters involved even though such tests could have been made by plaintiffs and such tests as were made were made by defendants and were negative. The Supreme Court cases stand for the principle that a state may not utilize the federal common law of nuisance to impose its will upon the citizens of another state absent hard evidence in these circumstances.

Among others discussed in our previous briefs and memorandum there are two fundamental reasons in this case for concluding that a federal common law nuisance has not been established. First, Illinois imposes less stringent discharge standards upon discharges to its own waters than the lower court has required of defendants in this case. Illinois does not return to its "nitrification" explanation at

oral argument which was shown to be without record or factual foundation, rather, Illinois now claims that it is unaware of any use of the water its regulations define as "primary contact waters" for body contact recreation or water supply, except where its applicable discharge standards require effluent to meet the same standards imposed by the lower court. Thus, Illinois would bypass the fact that pertinent Illinois regulations expressly permit the discharge of effluent which does not meet the same standards imposed upon appellants, where such discharges will be made to waters which may be used for primary contact. But Illinois' position is even more egregious! Illinois knows that its regulations *nowhere* impose a 5/5 with a 10/12 daily maximum limit; its regulations *nowhere* require a free chlorine residual; and, its regulations *nowhere* impose a 40 fecal coliform effluent limitation. *All* these effluent limitations are imposed on defendants. In fact, Illinois permits a continuous effluent discharge of *400* fecal coliforms per 100 milliliters. (Pl. Ex. 171 Part IV Effluent Standards § 405). In the same fashion Illinois bypasses the fact that its regulations allow 200 fecal coliform as a *water quality* level in water designated as "primary contact waters." (Pl. Ex. 171 Part II Water Quality Standard § 203(g)). Illinois' deceptive citation of a 20 fecal coliform (geometric mean) standard applicable only to Lake Michigan should not mislead this Court from the fact that primary contact such as bathing is permitted in Illinois' waters with a fecal coliform content of 200 per 100 milliliters (geometric mean) notwthstanding an uncited 100 per 100 milliliter figure not in the record. (Ill. Memorandum p. 26).

Illinois cannot be heard to argue in this context that if it ever finds someone swimming in its waters it will do something about it. We note that Illinois does not even tell us whether it intends to enjoin the swimmer or clean up the effluent.

The second fundamental reason for following the pattern set by the Supreme Court in ordering dismissal is the fact that in addition to a similar evidentiary record being present, here Congress has established a forum with expertise and the power to meet these questions on a discharge by discharge basis. Illinois has ignored the forum of the experts in favor of going to the self-admittedly inexpert district court. The case should be dismissed with the option open to the state to intervene in the permit process still, and most appropriately, available to plaintiffs. The federal courts following the example of the Supreme Court should avoid acting in these areas calling for scientific expertise without the clearest of proof.

Reversal, leaving the opportunity to pursue the administrative route of expertise would permit plaintiffs the advantage of the holding of *Ethyl Corp.* v. *Environmental Protection Agency,* 541 F.2d 1 (D.C. Cir. 1976). That is the case whose footnotes are quoted extensively at pages 27 and 28 of the Illinois brief. It is also a case which deals with the determination of scientific facts by an expert administrative tribunal and states in the *body* of the opinion at page 28 of 541 F.2d on the subject matter of the footnotes quoted by Illinois:

> "Where a statute is precautionary in nature, the evidence difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge, the regulations designed to protect the public health, *and the decision that of an expert administrator,* we will not demand rigorous step-by-step proof of cause and effect. (emphasis supplied)

We reiterate that the subject matter of this case is best placed before the expert tribunal created by Congress to deal with the scientific questions presented. Certainly this is most appropriate where the trier of fact has expressly stated a lack of expertise in the scientific areas considered.

Respectfully submitted,

/s/ Samuel J. Recht
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Elwin J. Zarwell
Samuel J. Recht
Andrew M. Barnes
Attorneys for Defendants-Appellants
The Sewerage Commission of the
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Amended Judgment Order of the United States District Court for the Northern District of Illinois

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 72 C 1253

PEOPLE OF THE STATE OF ILLINOIS, ex rel. WILLIAM J. SCOTT, Attorney General of the State of Illinois, *Plaintiff*,

and

PEOPLE OF THE STATE OF MICHIGAN, *Intervening Plaintiff*,

v.

CITY OF MILWAUKEE, WISCONSIN; CITY OF KENOSHA, WISCONSIN; CITY OF RACINE, WISCONSIN; CITY OF SOUTH MILWAUKEE, WISCONSIN; THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, *Defendants.*

AMENDED JUDGMENT ORDER

This Court's Judgment Order dated November 15, 1977 having been affirmed in part and reversed in part by the United States Court of Appeals for the Seventh Circuit, on April 26, 1979, under that Court's docket number 77-2246, and the case having been remanded to the Court for appropriate action in conformity with the Seventh Circuit Opinion, as herein set forth,

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendants CITY OF MILWAUKEE AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE and each of them and their agents, employees or successors in interest are hereby permanently enjoined from emitting sewage discharges, from the respective sewer pipes or structures owned or maintained by the defendants,

into Lake Michigan or any of its tributary waters, except as hereinafter permitted in this order and said defendants are hereby ordered to:

(1) The respective defendants shall in their respective jurisdictions eliminate all sewage overflows emanating from sewer piper or structures owned, operated or maintained by the defendants located outside of the area which was designed by the defendants at trial as the Combined Sewer System Area hereinafter ("CSO"). Elimination of such overflows shall be completed on or before July 1, 1986. For purposes of this order, an overflow is defined as a crossover, bypass, diversion structure, relief structure, pump station or any other device or mechanism by which human fecal waste is discharged directly or indirectly to public streams, rivers or lakes without collection and treatment according to the treatment methods and effluent limits set forth in paragraph (3) below. If, in defendants' opinion, completion by such date becomes impossible due to circumstances beyond defendants' control, then defendant(s) may apply to the Court for an extension of time for completion. Any such application, if opposed by either plaintiff, must be predicated on an evidentiary hearing preceded by adequate opportunity for discovery by plaintiffs. Defendant shall be required to prove the basis for and for necessity for such extension which extension shall be granted or denied in the sound discretion of the Court. Defendants shall pay plaintiff(s)' entire costs of any such application including reasonable attorneys' and experts' fees, and the costs of discovery, preparation and presentation of their position.

(2) The Commission defendants shall in three stages, the first to be completed on or before December 31, 1985; the second on or before December 31, 1987; and the third on or before December 31, 1989, put into

operation a collection, and conveyance system in the combined sewer system area ("CSO") which shall collect and convey all human fecal waste entering the sewers in the combined sewer system area. The first stage of such system shall have storage capacity of not less than 700 acre feet, the second not less than an additional 1290 acre feet, and at the completion of the third stage (December 31, 1989) the entire system shall have storage capacity of not less than 2605 acre feet and shall be designed and operated within such storage capacity so as to collect, convey and store the volume of flow and all human fecal waste capable of transmission by the combined sewer system. Defendants have analyzed rainfall events experienced during the period 1940 through the date hereof (which is the period for which detailed hourly rainfall data is available) and have represented to this Court that their analysis demonstrates that at a storage capacity of 2605 acre feet, there would have been no overflows from such a system. All fecal wastes and flows collected and conveyed from the combined sewer area shall be treated according to the treatment methods and to the effluent limits set forth in paragraph (3) below.

Overflows, if any, which do occur shall constitute a violation of this order unless defendants can prove as a defense to a charge of violation either:

(1) that the overflow resulted from runoff conditons which exceeded the capacity of the 2605 acre feet of storage at a pump out rate to the treatment required by this Judgment Order of 110 CFS; and that the runoff events which resulted in the overflow would have caused an overflow in excess of the design capacity of the 2605 acre feet storage system at 110 CFS under the identical scientific premises and caluculations used by the defendants prior to the date of this order to design the size of such storage system; or in

the case of overflows resulting from causes other than excess runoff events,

(2) that the overflow was wholly caused by actions or occurrences wholly outside the control of the defendants and was in no way caused or contributed to by the negligence of the defendants.

Any defense to an overflow violation shall be predicated on an evidentiary hearing preceded by an adequate opportunity for discovery by plaintiffs. Defendants shall bear the evidentiary burden of proof of establishing the defenses listed above, and if the Court finds that the defense has not been proven, shall pay plaintiff(s)' entire costs of opposing any such defense including reasonable attorneys' and experts' fees and the costs of discovery, preparation, and presentation of plaintiffs' position. In any event, any overflows which may conceivably occur shall be subjected to treatment by bar screens, followed by drum screens, followed by chlorination prior to discharge. Should defendants develop information which establishes in defendants' opinion that separation of all or part of the system is a preferred alternative, which will provide a collection and treatment level equal to or better than that required herein then defendants may apply to the Court for modification of this paragraph to provide therefor. Any such modification, if opposed by either plaintiff, must be predicated on an evidentiary hearing preceded by adequate opportunity for discovery by plaintiffs. Defendants shall bear the evidentiary burden of proof of establishing that such modification equals or exceeds the level of protection provided herein. Defendants shall pay plaintiff(s)' entire costs of any such application including reasonable attorneys' and experts' fees, and the cost of dis-

covery, preparation and presentation of their position.

(3) The Commission defendants or their successors in interest shall from and after December 31, 1985 treat all human fecal wastes which reach existing, expanded, or newly constructed treatment plants owned, operated, or maintained by the defendants by means of appropriate secondary treatment facilities which facilities shall as of December 31, 1986 and thereafter produce an effluent which does not exceed thirty (30) milligrams per liter (mg/l) suspended solids and thirty (30) milligrams per liter of five (5)-day carbonaceous biochemical oxygen demand (BOD_5). From and after December 31, 1986, there shall be no by-pass at any existing, expanded or newly constructed treatment plant.

The effluent requirements for suspended solids and BOD_5 shall be calculated on the basis of the arithmetic mean of daily composite samples collected in a period of 30 consecutive days, provided that the arithmetic mean of the values for effluent samples collected in a period of 7 consecutive days shall not exceed 45 milligrams per liter; and provided further that the monthly average shall not exceed 15% of the average carbonaceous BOD_5 or suspended solids influent during the same period.

Fecal coliform counts in the effluent shall not exceed 200 per 100 milliliters as a smoothly geometric means and shall not exceed 400 per 100 milliliters as a weekly geometric mean. Fecal coliform requirements shall be calculated on the basis of twice weekly grab samples.

Phosphorus (P) concentrations shall be no more than one (1) milligram per liter based on a monthly average.

Defendants shall monitor both total residual chlorine and available free chlorine in the effluent.

(4)Plaintiffs have emphasized their concern to maintain a detailed understanding of defendants' progress in designing and constructing the facilities ordered by the Court. Defendants have agreed to and shall allow plaintiffs, during working hours and upon reasonable notice, to conduct a continuing engineering audit of defendants' progress in complying with this order and have agreed to permit plaintiffs (and persons designated by plaintiffs) complete access to all planning, testing, design and construction or operational work or materials prepared by defendants or their consultants. Defendants have also agreed to and shall promptly pay the reasonable charges or fees of persons designated by plaintiffs to conduct such continuing engineering audit provided that such engineering audit activities to be paid by defendants shall not exceed 50 man days per calendar year; and any of such required payments accrued or made during the course of appeal shall be and remain the obligation of defendants regardless of the outcome of any appeal.

(5) During the periods necessary to complete the facilities required for compliance with the provisions of this order, as set forth above, the defendants shall be permitted, on the basis of using the best engineering practices available within the limits of the capabilities of those facilities, to continue the operations of their respective sewage collection, treatment and discharge facilities as the same may be modified from time to time to comply with the requirements of this order. Existing disinfectant systems shall be maintained and operated in such periods and no new by-passes or

overflows shall be installed or operated during such periods except that prior to December 31, 1986 *and not thereafter* a by-pass may be installed and operated if required as a protective device to protect the South Shore Plant and then only if triggered at and operated during the existence of a flow rate equal to or greater than the plant flow capacity (260 to 316 mgd) for flow in excess of such capacity. In the event that plaintiff(s) challenge any overflow as being in violation of the provisions of this order for the reason that such overflow was not triggered by and limited to flows in excess of plant capacity, it shall be the burden of the defendants to prove in an evidentiary hearing preceded by adequate discovery by plaintiff(s) that such overflow was triggered by and limited to flows in excess of plant capacity. If the Court finds that the defense has not been proven, defendant(s) shall pay plaintiff(s)' entire costs of opposing any such defense including reasonable attorneys' and experts' fees and the costs of discovery, preparation and presentation of plaintiffs' position.

As set forth in paragraph (3) above, all by-passes shall be eliminated by December 31, 1986. If one or more additional temporary overflows become necessary in defendants' opinion in the defendant City of Milwaukee's system for operation to protect the public health prior to December 31, 1986, then defendants may apply to the Court for a modification of this paragraph 5 to permit operation of such additional overflows up to but not after December 31, 1986. All such overflows shall be eliminated by December 31, 1986. Any such modification, if opposed by plaintiffs, must be predicated on an evidentiary hearing preceded by adequate opportunity for discovery by plain-

tiff(s). Defendants shall bear the evidentiary burden of proof establishing the public requirements for such modification which shall be founded in such public health requirements as, but not limited only to, preventing the backing-up of sewage in basements. Defendants shall pay plaintiff(s)' entire costs of any such application including reasonable attorneys' and experts' fees and the costs of discovery, preparation and presentation of their position. Nothing herein shall relieve defendants or any of them from compliance with other applicable discharge standards.

(6) As a joint and several responsibility, defendants shall pay immediately to plaintiffs the amount of $230,000.00, in the manner directed by plaintiffs, as costs of these proceedings, in lieu of following normal procedures to tax costs by the Clerk of this Court. Such sum in total shall be returned to defendants in the event judgment is reversed in toto; in no event shall defendants question the individual items or dollar amounts within such total.

(7) All burdens of proof set forth as requirements of this Amended Judgment Order shall be met by a standard of preponderance of the evidence.

(8) The Court hereby approves and orders the defendants to adhere to the schedules set forth in Exhibits 1 and 2 attached to the original Judgment Order in this cause for compliance with this Amended Judgment Order, excepting only the references therein to advance waste treatment. If defendants apply to the Court for modification of any component of the time schedules ordered herein, such modification, if opposed by plaintiffs or

either of them, must be predicated on an evidentiary hearing preceded by adequate opportunity for discovery by plaintiffs. Defendants shall bear the burden of proof that such modification is required by causes wholly outside the control of the defendants or their agents, consultants or employees, and was in no way caused or contributed to by the negligence o fthe defendants or their agents, consultants or employees. The granting or denial of any such application shall be in the sound discretion of the Court.

(9) The Court hereby expressly reserves jurisdiction over the parties hereto and over the subject matter hereof to enforce the provisions of this Amended Judgment Order.

Entered: January 31, 1980

/s/ JOHN F. GRADY
John F. Grady
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 72 C 1253

PEOPLE OF THE STATE OF ILLINOIS, ex rel. WILLIAM J. SCOTT, Attorney General of the State of Illinois, *Plaintiff*,

and

PEOPLE OF THE STATE OF MICHIGAN, *Intervening Plaintiff*,

v.

CITY OF MILWAUKEE, WISCONSIN; CITY OF KENOSHA, WISCONSIN; CITY OF RACINE, WISCONSIN; CITY OF SOUTH MILWAUKEE, WISCONSIN; THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, *Defendants.*

SUPPLEMENT #1 TO THE JUDGMENT ORDER

WHEREAS, one of the provisions of the Judgment Order herein relating to the Combined Sewer System area (CSO) is: "Should def ıdants develop information which establishes in defendants' opinion that separation of all or part of the system is a preferred alternative, which will provide a collection and treatment level equal to or better than that required herein, then defendants may apply to the Court for modification of this paragraph to provide therefor."; and,

WHEREAS, proceedings herein are not now stayed and the parties expressly agree that proceeding to secure the modification of the Judgment Order reflected herein is without

prejudice to the positions of the parties in respect of objections they have heretofore made herein or any appellate procedures now being or hereafter pursued by the parties or any of them; and

WHEREAS, the respective defendants have represented to the Court that in defendants' opinion it is the preferred alternative to totally eliminate overflows from certain portions of the CSO by means of storm sewer/sanitary sewer separation rather than to build a conveyance, storage and treatment system in those portions of the CSO; and

WHEREAS, the respective defendants have represented that the certain portions of the CSO, where such separation is the preferred alternative to a convey, store and treat system, represent approximately 8% of the CSO and that these portions are identified on the attached map (Appendix A to this Supplement No. 1 to the Judgment Order);

NOW, THEREFORE, upon the subjoined stipulation of the parties, it is hereby ordered, adjudged and decreed that:

From this date forward defendants shall separate the sewer system in the portion of the Combined Sewer System Area (CSO) marked on Appendix A and upon separation such separated system shall be subject to the exact same requirement of the Judgment Order regarding sewage collection and elimination of overflows as all other areas covered by the Judgment Order which are outside the combined sewer system area.

Dated this 31 day of January, 1980.

/s/ JOHN F. GRADY

The foregoing order is hereby stipulated and agreed to and may be entered upon application of defendants as Supplement No. 1 to the Judgment Order herein without further notice.

PEOPLE OF THE STATE OF ILLINOIS

By /s/ WILLIAM J. SCOTT by
JOSEPH V. KARAGANIS

PEOPLE OF THE STATE OF MICHIGAN

By /s/ THOMAS J. EMORY for
FRANK T. KELLEY
Attorney General

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE

By /s/ EDWIN J. ZARWELL
Its Attorney

CITY OF MILWAUKEE

By /s/ GRANT F. LANGLEY
Asst. City Atty.

Order of the Supreme Court of the United States
(Mr. Justice Stevens)

SUPREME COURT OF THE UNITED STATES

No. A-918 (79-408)

CITY OF MILWAUKEE, ET AI
Petitioners,

v.

ILLINOIS, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners, the response filed by the State of Illinois and the reply thereto,

IT IS ORDERED that all judgments, decrees and orders entered by the United States Court of Appeals for the Seventh Circuit, Case No. 77-2246, and the United States District Court for the Northern District of Illinois in the above-entitled case be, and the same are hereby, stayed pending the sending down of the judgment of this Court.

/s/ JOHN PAUL STEVENS
Associate Justice of the Supreme
Court of the United States

Dated this 8 day of May, 1980

A true copy MICHAEL RODAK, JR.
Test:

Clerk of the Supreme Court of the United States
By /s/ FRANCIS J. LORSON
Deputy

Plaintiff's Exhibit 62 (relevant portions)

Permit No. WI-0024767
Application No. WI-0024767

PERMIT TO DISCHARGE UNDER THE WISCONSIN POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of Chapter 147, Wisconsin Statutes,

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE

is permitted to discharge from a facility located at

700 EAST JONES STREET, MILWAUKEE (JONES ISLAND PLANT)

to LAKE MICHIGAN

in accordance with the effluent limitations, monitoring requirements and other conditions set forth in Parts I and II hereof.

This permit shall become effective on the date of signature.

This permit to discharge shall expire at midnight, June 30, 1977.

Permittee shall not discharge after the date of expiration. If the permittee wishes to continue to discharge after this expiration date he shall file an application for reissuance of his permit in accordance with the requirements of Chapter NR 200, Wisconsin Administrative Code, at least 180 days prior to this expiration date.

State of Wisconsin Department of Natural Resources
For the Secretary

By /s/ OLIVER D. WILLIAMS
Oliver D. Williams
Acting Administrator
Division of Environmental Standards

Dated this 27th day of December, 1974

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SPECIAL CONDITIONS

A. Effluent Limitations and Monitoring Requirements

(1) During the period beginning on the effective date of the permit and lasting until June 30, 1977 the permittee is authorized to discharge from outfall serial number 001 (treatment plant outfall).

(2) This discharge shall be limited and monitored by the permittee as specified below.

(a) There shall be no discharge of floating solids or visible foam in other than trace amounts.

(b) Samples taken in compliance with the monitoring requirements specified below shall be taken at locations prescribed in Part II, C.

	Daily Effluent Limitations					Monitoring Requirements	
	Quantity-kg/day (lbs/day)		Other Limitations (Specify Units)			Sample	Sample
Effluent Characteristic	Average*	Maximum	Minimum	Average	Maximum	Frequency	Type
Total Flow			—	—	—	Daily	Continuous
BOD_5	22,669 (50,090)	—	—	30 mg/l	—	Daily	24 hr. composite
BOD_5	34,002 (75,060)	—	—	45 mg/l	—	Daily	24 hr. composite
Suspended Solids (Monthly)	22,669 (50,090)	—	—	30 mg/l	—	Daily	24 hr. composite
Suspended Solids (Weekly)	34,002 (75,060)	—	—	45 mg/l	—	Daily	24 hr. composite
pH	—	—	6.0	—	9.0	2xDaily	Grab
Fecal Coliform (Monthly)	—	—	—	200/100 ml	—	2xWeekly	Grab
Fecal Coliform (Weekly)	—	—	—	400/100 ml	—	2xWeekly	Grab
Total Phosphorus (Monthly)	758 (1,670)	—	—	1 mg/l	—	1xDaily	24 hr. composite
Total Residual Chlorine**	—	—	—	—	—	Daily	Grab
Free Available Chlorine***	—	—	—	—	—	2xWeekly	Grab

*Load limitations have been calculated using a flow of 200 MGD.

**Total residual chlorine shall be monitored using the amperometric tritration method.

***Free available chlorine shall be monitored using both the orthotolidine method and the amperometric titration method.

B. The arithmetic mean of the values for effluent samples of 5-day BOD and suspended solids collected in a reporting period shall not exceed 15 percent of the arithmetic mean of the values for influent samples collected at approximately the same time during the same period (85 percent removal).

C. Sample Collection Locations

1. Beginning on the effective date of this permit the permittee shall collect influent samples at a point prior to the discharge of sewage wastes to the aeration basins. By January 1, 1976, the permittee shall install equipment and collect influent samples following coarse screening and preceding the grit chambers. These samples shall be analyzed for BOD, Suspended Solids and Total Phosphorus as a minimum. These samples shall be taken on the same frequency and with the same sample type as the effluent.

2. The permittee shall collect effluent samples from both the East Plant and the West Plant at a point following the final clarifiers of each plant, respectively. These samples shall be analyzed for BOD, Suspended Solids, pH, and Total Phosphorus as a minimum, in accordance with the sampling frequency and sample type contained in Part II, Page 1 of 6.

3. The permittee shall collect samples of the combined outfall following disinfection and immediately prior to discharge to Lake Michigan. These samples shall be analyzed for BOD, Suspended Solids, pH, Total Phosphorus, Fecal Coliform, Residual Chlorine and Free Available Chlorine as a minimum, in accordance with the sampling frequency and sample type contained in Part II, paragraph A. Compliance with the effluent limitations as stated in Part II, page 1

of 6, will be determined based on the analysis of samples collected as specified in this paragraph.

4. The permittee shall measure total effluent flow, and effluent flow from both the East Plant and the West Plant.

D. MONITORING AND RECORDING

1. *Sampling Requirements*

Unless specified otherwise herein, samples shall be taken in accordance with Chapter NR 218 of the Wisconsin Administrative Code.

2. *Reporting*

a. Monitoring reports and reports required by Section 12, 20, 21 and 23 of Part I of this permit shall be signed by a principal executive officer, a ranking elected official, or other duly authorized representative.

b. Monitoring results obtained during the previous month shall be summarized and reported on a Discharge Monitoring Report Form, postmarked no later than the 15th day of the month following the completed reporting period. The first report is due on February 15, 1975. Duplicate signed copies of these shall be submitted to the:

Wisconsin Department of Natural Resources
Southeast District
Division of Environmental Protection (Permits)
11611 West North Avenue
Milwaukee, Wisconsin 53226

c. All other reports required herein shall be submitted to the:

Wisconsin Department of Natural Resources
WPDES Permit Section
Post Office Box 450
Madison, Wisconsin 53701

3. Additional monitoring requirements to be reported to the Wisconsin Department of Natural Resources, WPDES Permit Section:

a. The influent 5-day BOD and suspended solids shall be monitored on the same frequency with the same sample type as required of the effluent.

b. Flow measurement of the wastewater volume received at the treatment plant, including any bypassed flow, shall be monitored continuously.

4. *Disposal of Collected Solids*—The permittee shall provide the Wisconsin Department of Natural Resources a report by September 30, 1975 containing data on the disposal of collected solids. The report shall specifically contain as a minimum—

a. The average volume of grit disposed on a monthly basis.

b. The average volume of fine screenings disposed on a monthly basis.

c. The average volume of waste activated sludge disposed on a monthly basis.

d. The type of treatment effected prior to disposal of grit and screenings.

e. The means by which the grit and screenings are disposed.

f. The exact location of all grit and screenings disposal areas.

g. The average volume of Milorganite produced on a monthly basis.

Based upon an analysis of this report, this permit may be revised or modified to include provisions for the disposal of collected solids.

5. Requirements for effluent limitations on pollutants attributable to industrial users:

a. Effluent limitations on pollutants from this discharger are listed in this permit. It is apparent that other pollutants attributable to inputs from significant industrial users of the municipal system are also present in the permittee's discharge. At such time as sufficient information becomes available to establish limitations for such pollutants, and after notice and opportunity for public hearing as provided in Chapter NR 3 of the Wisconsin Administrative Code, this permit may be revised to specify effluent limitations for any or all of such other pollutants.

b. As required by Chapter NR 211 of the Wisconsin Administrative Code, the permittee shall, with respect to all major contributing industries impose such pretreatment requirements on such industrial users as may be necessary to assure compliance by the permittee with all applicable effluent limitations set forth in this permit. A major contributing industry is one that: (a) has a flow of 50,000 gallons or more per average work day; (b) has a flow greater than five percent of the flow carried by the municipal system receiving the waste; (c) has a material in its discharge included on a list of toxic pollutants issued under Section 147.07(1), Wisconsin Statutes, or (d) has significant impact, either singularly or in combination with other contributing industries, on the treatment works or the quality of its effluent.

Starting on December 31, 1975, the permittee shall provide a report once every three months to the Department WPDES Permit Section regarding the pretreatment requirements which have been imposed on each major industrial user and the results achieved therefrom.

c. Immediately upon issuance of this permit, the permittee shall establish and implement a procedure to obtain from all significant industrial users specific information on the quality and quantity of effluents introduced by such industrial users and their impact on the overall municipal discharge. The form prescribed in Chapter NR 202 of the Wisconsin Administrative Code shall be submitted to the Department by the permittee for each significant industrial user which (1) discharges at least 10,000 gallons of effluent on any day of the year into this permitted treatment works, (2) has a flow greater than five percent of the total flow carried by the municipal system receiving the waste, (3) has a toxic material in its discharge, or (4) has been notified in writing by the Department that it is necessary to complete this form. All NR 202 forms shall be submitted to the Department on a quarterly basis beginning December 31, 1975; quarterly reports reflecting no change from the previous quarter may simply relate this fact without submitting repetitive data. NR 202 requires significant industrial users to submit to the permittee this form upon request of the permittee.

6. The Sewerage Commission of the City of Milwaukee is required to initiate a program leading to the elimination or control of all discharge overflow and/or bypass points in the Jones Island Collector System at discharge points

003 through 019, 021, 023, 024, 026, 029 through 032, 044 through 046, 048 through 050 (as identified below) to assure attainment of all applicable Water Quality Standards.

a. On or before December 31, 1975, the permittee shall submit to the Wisconsin Department of Natural Resources a plan for the elimination of all discharge points noted above (except those in the combined sewer area which are covered in subparagraph C). Such plan shall include alternative engineering solutions for the elimination of each discharge point, a recommended solution for the elimination of each discharge point, an estimate of cost for the elimination of each discharge point and a time schedule for the elimination of each discharge point. If it is determined by the Department that the plan is incomplete or inadequate, the plan may be returned to the permittee with the reasons therefore, following which the plan shall be modified by the permittee and resubmitted within 60 days. After acceptance by the Department of an adequate plan, this permit may be modified to incorporate the specific provisions and time schedules contained in the plan.

b. On or before June 30, 1975, the permittee shall complete "Attachment A" for each discharge identified below, and submit the completed forms to the Department.

c. The permittee shall complete facilities planning for the combined sewer area in accordance with the terms and conditions of Treatment Works Grant C550772-01. The facilities planning elements include a feasibility study, cost-effectiveness analysis and environmental assessment for elimination or control of the discharges from the combined sewers. The permittee shall submit to the Department of Natural Resources, WPDES Permit Section, quarterly progress reports on the facilities planning process. The first quarterly report shall be due March 31, 1975.

d. On or before March 31, 1975, the permittee shall identify to the Department 7 discharge points (chosen from those identified below) which are considered by the permittee to have the most significant impact on water quality. Following concurrence by the Department, the permittee shall by December 31, 1975, install equipment to continuously measure all flows discharged from the 7 selected discharges and shall install equipment to adequately sample the flow discharged. Beginning March 31, 1976, and every three months thereafter until the discharges are eliminated or controlled, the permittee shall submit a report to the Department containing data on the date of discharge, volume of discharge and sample analysis for each discharge. Each sample shall be analyzed for BOD, Suspended Solids, pH, Fecal Coliform and any other parameters that the Department may require. In event the facilities planning referred to in (c) above identifies more than 7 discharges which will be monitored, the permittee shall submit on a quarterly basis information on all discharges monitored beginning at the close of the quarter during which the monitoring is initiated.

"ATTACHMENT A"

1. Discharge Serial Number:

2. Discharge Location: _____

3. Name of Receiving Water: _____

4. Occurrence (check when discharge occurs)

   Wet weather _____Yes, _____No
   Dry weather _____Yes, _____No

5. Frequency (Give the actual or approximate number of incidents per year)

   Wet weather _____times per year
   Dry weather _____times per year

6. Duration (Give the average duration per event in hours)

   Wet weather _____hours
   Dry weather _____hours

7. Volume (Give the average volume per incident in thousand gallons)

   Wet weather _____thousand gallons per incident
   Dry weather _____thousand gallons per incident

8. Reason (Give brief reason or justification for discharge)

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES
Box 450—Madison, Wisconsin 53701
L. P. Voight, Secretary

In Reply Refer to: 3420

Certified Mail
Return Receipt Requested

Mr. Robert J. Bochardt
Chief Engineer & General Manager
Sewerage Commission of the City of Milwaukee
P.O. Box 2079
Milwaukee, Wisconsin 53201

RE: Amendment of WPDES Permit No. WI-0024767 (Jones Island)

Dear Mr. Bochardt:

The Department has discovered that some confusion may exist as to what is actually required under Part II, page 2 of 6, Sample Collection Locations.

The page which is attached, namely, page 2 of 6 of Part II, replaces page 2 of 6 of Part II, of the original permit issued on December 27, 1974. Paragraphs 1, 2 and 3 under Sample Collection Locations have been reworded to clearly indicate what is required. The requirements have in no way been changed from the issued permit. Please replace the original page with this attached modified page in all copies of the permit which you retain in your records. All discharges from this facility and actions or reports relating thereto shall be in accordance with the terms and conditions of the original permit.

The WPDES permit program has been approved by the Administrator of the U.S. Environmental Protection Agency pursuant to Section 402(b) of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. Section 1342(b)). Therefore, this permit is subject to enforcement

under Section 147.21 and 147.29, Wisconsin Statutes and Section 309 of the Federal Act (33 U.S.C. Section 1319).

/s/ Oliver D. Williams
Oliver D. Williams
Acting Administrator
Division of Environmental Standards

Dated January 9, 1975

cc: U.S. Environmental Protection Agency
Attn: Permits Branch
Southeastern District

SPECIAL CONDITIONS

B. The arithmetic mean of the values for effluent samples of 5-day BOD and suspended solids collected in a reporting period shall not exceed 15 percent of the arithmetic mean of the values for influent samples collected at approximately the same time during the same period (85 percent removal).

C. Sample Collection Locations

1. Beginning on the effective date of this permit the permittee shall collect influent samples (24 hour composites, daily) at a point prior to the discharge of sewage wastes to the aeration basins. By January 1, 1976, the permittee shall install equipment and collect influent samples following coarse screening and preceding the grit chambers. These samples shall be analyzed for BOD, Suspended Solids and Total Phosphorus as a minimum.

2. The permittee shall collect effluent samples (24 hour composites, daily) from both the East Plant and the West Plant at a point following the final clari-

fiers of each plant, respectively. These samples shall be analyzed for BOD, Suspended Solids, pH, and Total Phosphorus as a minimum.

3. The permittee shall collect samples (24 hour composites, daily) of the combined outfall following disinfection and immediately prior to discharge to Lake Michigan. These samples shall be analyzed for BOD, Suspended Solids, pH, Total Phosphorus, Fecal Coliform, Residual Chlorine and Free Available chlorine as a minimum, in accordance with the sampling frequency contained in Part II, paragraph A. Compliance with the effluent limitations as stated in Part II, page 1 of 6, will be determined based on the analysis of samples collected as specified in this paragraph.

4. The permittee shall measure total effluent flow, and effluent flow from both the East Plant and the West Plant.

GENERAL CONDITIONS

1. *Compliance*

All discharges authorized herein shall be consistent with the terms and conditions of this permit. The discharge of any pollutant identified in this permit more frequently than or at a level in excess of that authorized shall constitute a violation of the permit.

2. *Adverse Impact*

The permittee shall take all reasonable steps to minimize any adverse impact on waters of the State resulting from noncompliance with any effluent limitations specified in this permit, including such special or additional monitoring as may be required by the Department or may be necessary to determine the nature and impact of the noncomplying discharge.

3. *Removed Substances*

Solids, sludges, filter backwash or other pollutants removed from or resulting from treatment or control of wastewaters or intake waters shall be stored and disposed of in a manner such as to prevent any pollutant from such materials from entering the waters of the State. Land disposal of treatment plant solids and sludges shall be either at a site or operation licensed by the Department under Chapter NR 151,Wisconsin Administrative Code, or in accordance with a sludge disposal plan approved by the Department.

4. *Right of Entry*

The permittee shall allow authorized representatives of the Department of Natural Resources, and the Administrator of the United States Environmental Protection

Agency or his authorized representatives, upon the presentation of credentials:

a. To enter upon the permittee's premises where an effluent source is located or in which any records are required to be kept under the terms and conditions of this permit; and

b. At reasonable times to have access to and copy any records required to be kept under the terms and conditions of this permit; to inspect any monitoring equipment or monitoring method required in this permit; and to sample any wastewaters.

5. *Permit Modification*

After notice and opportunity for a hearing as provided in Section 147.03, Wisconsin Statutes, this permit may be modified, suspended, or revoked in whole or in part during its term for cause including, but not limited to, the following:

a. Violation of any terms or conditions of this permit;

b. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts; or

c. A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

6. *Toxic Pollutants*

Nothing in this permit shall be construed to authorize the discharge of any toxic pollutant or combination of pollutants in amounts or concentrations which exceed any applicable toxic effluent standard or prohibition, including

any schedule of compliance specified in any such effluent standard or prohibition, promulgated under Section 147.07 (1), Wisconsin Statutes.

If a toxic effluent standard or prohibition, including any schedule of compliance specified in such effluent standard or prohibition, is promulgated under Section 147.07(1), Wisconsin Statutes, for a toxic pollutant or combination of pollutants which is present in the discharge and such standard or prohibition is more stringent than any limitation for such pollutant in this permit, this permit shall be revised or modified in accordance with the toxic effluent standard or prohibition.

7. *Civil and Criminal Liability*

Except as provided in permit conditions on "Bypassing" (Part I, 23) and "Power Failures" (Part I, 24), nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties under Section 147.21, Wisconsin Statutes, for noncompliance with the terms and conditions of this permit.

8. *Oil and Hazardous Substance Liability*

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Federal Water Pollution Control Act (33 U.S.C. Section 1321).

9. *State Laws*

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any other applicable State law or regulation.

10. *Property Rights*

The issuance of this permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.

11. *Severability*

The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

12. *Schedule of Compliance Progress Reports*

No later than 14 calendar days following a date identified in any schedule of compliance in Part II, the permittee shall submit either a report of progress or, in the case of specific actions being required by identified dates, a written notice of compliance or noncompliance. In the latter case, the notice shall include the cause of noncompliance, any remedial actions taken, and the probability of meeting the next scheduled requirements.

13. *Test Procedures*

Test procedures used for the analysis of pollutants shall be those listed in Chapter NR 219, Wisconsin Administrative Code, or an alternate method authorized in Part II.

14. *Recording of Results*

For each measurement or sample taken pursuant to the requirements of this permit, the permittee shall record the following information:

a. The exact place, date, and time of sampling;

b. The dates the analyses were performed;

c. The person(s) who performed the analyses;

d. The analytical techniques or methods used; and

e. The results of all required analyses.

15. *Additional Monitoring by Permittee*

If the permittee monitors any pollutant at the location(s) designated herein more frequently than required by this permit, using approved analytical methods as specified in Chapter NR 219, the results of such monitoring shall be included in the Discharge Monitoring Report Form 3200-28. Such increased frequency shall also be indicated.

16. *Records Retention*

All records and information resulting from the monitoring activities required by this permit including all records of analysis performed and calibration and maintenance of instrumentation and recordings from continuous monitoring instrumentation shall be retained for a minimum of three (3) years, or longer if requested by the Department of Natural Resources.

17. *Construction of Onshore or Offshore Structures*

This permit does not authorize or approve the construction of any onshore or offshore physical structure of facilities or the undertaking of any work in any navigable waters.

18. *Confidential Information*

Except for data determined to be confidential under Section 147.08(2)(c), Wisconsin Statutes, all monitoring reports required by this permit shall be available for public inspection at the headquarters of U.S. EPA Region V and the Department of Natural Resources. Knowingly making any

false statement on any such report may result in the imposition of criminal penalties as provided for in Section 147.21, Wisconsin Statutes.

19. *Transfer of Control of Operation*

In the event of a transfer of control of operation of the facility from which the permitted discharges emanate to a person not named on page one (1) of this permit, the permittee prior to such transfer shall notify his successor by letter that this permit is not transferable and that prior to any discharge after such transfer, a new WPDES permit must be obtained. A copy of this letter shall be forwarded to the Department of Natural Resources, WPDES Permit Section, Box 450, Madison, Wisconsin 53701.

20. *Change in Discharge*

Facility modifications, additions, and/or expansions that increase the plant capacity must be reported to the Department and this permit then modified or reissued to reflect such changes. Any anticipated change in the facility discharge, including any new significant industrial discharge or significant changes in the quantity or quality of existing industrial discharges of pollutants must be reported to the Department. Modifications to the permit may then be made to reflect any necessary changes in permit conditions, including any necessary effluent limitations for any pollutants not identified and limited herein. In no case are any new connections, increased flows, or significant changes in influent quality permitted that will cause violation of the effluent limitations specified herein.

21. *Noncompliance Notification*

If for any reason the permittee does not comply with or will be unable to comply with any effluent limitation speci-

fied in this permit, or should any unusual or extraordinary discharge of wastes occur from the facilities herein permitted, the permittee shall provide the Department in writing within five days of such occurrence with the following information:

a. A description of the noncomplying discharge including its impact upon the receiving waters.

b. Cause of noncompliance.

c. Anticipated time the condition of noncompliance is expected to continue, or if such condition has been corrected, the duration of the period of noncompliance.

d. Steps taken by the permittee to reduce and eliminate the noncomplying discharge.

e. Steps to be taken by the permittee to prevent recurrence of the condition of noncompliance.

22. *Facility Operation and Quality Control*

All waste collection, control, treatment and disposal facilities shall be operated in a manner consistent with the following:

a. At all times, all facilities shall be operated as efficiently as possible and in a manner which will minimize upsets and discharges of excessive pollutants.

b. The municipal wastewater treatment facility must be under the supervision of a State certified operator as required by Chapter NR 114 of the Wisconsin Administrative Code.

c. Maintenance of treatment facilities that results in degradation of effluent quality shall be scheduled during non-critical water quality periods and shall be carried out in a manner approved by the Department.

23. *Bypassing*

The diversion or bypass of any discharge at the treatment works is prohibited except (i) an inadvertent bypass lasting no longer than one hour and resulting from equipment damage or temporary power interruption, or (ii) an unavoidable bypass necessary to prevent loss of life or severe property damage, or (iii) a bypass of excessive storm drainage or runoff which would damage any facilities necessary for compliance with the effluent limitations and

prohibitions of this permit. In the event of occurrence of a bypass described by (ii) or (iii) the permittee shall immediately notify the Department District Office by telephone of such occurrence. In addition, the permittee shall notify the Department of Natural Resources, WPDES Permit Section and the Administrator of the U.S. EPA—Region V in writing of each such diversion or bypass by letter within 72 hours.

24. *Power Failures*

The permittee is responsible for maintaining adequate safeguards to prevent the discharge of untreated or inadequately treated wastes during electrical power failure either by means of alternate power sources, standby generators or retention of inadequately treated effluent. Should the treatment works not have the above capabilities at the time of permit issuance, the permittee must furnish within 120 days to the Department, for approval, plans for such facilities and an implementation schedule for their installation.

25. *Pretreatment*

The permittee shall require any industrial user of the permitted facility to provide pretreatment as required under Section 147.07(2), Wisconsin Statutes to provide any rec-

ords, reports or information related to any pretreatment or new source performance standards. Any industrial user of the permitted facility shall be required by the permittee to prepare and submit to the WPDES Permit Section periodic notices of progress toward full compliance with the requirements of Section 147.07(2), Wisconsin Statutes. Such notices shall be submitted at intervals not to exceed 9 months or as required elsewhere in this permit.

26. *Prohibited Wastes*

Under no circumstances shall the permittee allow introduction into the waste treatment system of wastes prohibited by NR 211.10, Wisconsin Administrative Code, which include those

a. Which create a fire or explosion hazard in the treatment works,

b. Which will cause corrosive structural damage to treatment works,

c. Solid or viscous substances in amounts which cause obstructions to the flow in sewers or interference with the proper operation of the treatment works,

d. Wastewaters at a flow rate and/or pollutant discharge rate which is excessive over relatively short time periods so as to cause a loss of treatment efficiency,

e. New wastes or increased volumes or quantities of wastes from major contributing industries in such volumes or quantities as to overload the treatment works or cause a loss of treatment efficiency.

27. *Definition Terms*

(i) For those terms used in Parts I and II which are defined in Section 147.015, Wisconsin Statutes, the meanings of that Section shall apply.

(ii) As used in Daily Effluent Limitations, Part II:

(1) "Average" means the arithmetic mean of daily monitoring test results obtained during a calendar month for the given parameter; that is the total of such daily results, in pounds per day, milligrams per

liter, or other appropriate unit divided by the number of days for which results are totaled. For example, if a facility operates or discharges and monitors 30 days during a month the daily average is the sum of daily values in pounds per day, milligrams per liter, or other appropriate unit divided by 30 for each parameter, but if one day's result is missing for any parameter the divisor in that case is 29.

(2) "Maximum" means the highest daily monitoring test result, in pounds per day, milligrams per liter, or other appropriate unit during the calendar month for the given parameter.

(3) "Minimum" means the lowest daily monitoring test result, in the appropriate unit, during the calendar month for the given parameter.

(4) The "average" for fecal coliform bacteria shall be the geometric mean of the samples collected in a reported period.

Permit No. WI-0024775
Application No. WI-0024775

Plaintiff's Exhibit 63 (relevant portions)

PERMIT TO DISCHARGE UNDER THE WISCONSIN POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of Chapter 147, Wisconsin Statutes,

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE
is permitted to discharge from a facility located at

8500 SOUTH FIFTH AVENUE, OAK CREEK
(SOUTH SHORE PLANT)

to LAKE MICHIGAN

in accordance with the effluent limitations, monitoring requirements and other conditions set forth in Parts I and II hereof.

This permit shall become effective on the date of signature.

This permit to discharge shall expire at midnight, June 30, 1977.

Permittee shall not discharge after the date of expiration. If the permittee wishes to continue to discharge after this expiration date he shall file an application for reissuance of his permit in accordance with the requirements of Chapter NR 200, Wisconsin Administrative Code, at least 180 days prior to this expiration date.

State of Wisconsin Department of Natural Resources
For the Secretary

By /s/ OLIVER D. WILLIAMS
Oliver D. Williams
Acting Administrator
Division of Environmental Standards

Dated this 18th day of December, 1974

GENERAL CONDITIONS

1. *Compliance*

All discharges authorized herein shall be consistent with the terms and conditions of this permit. The discharge of any pollutant identified in this permit more frequently than or at a level in excess of that authorized shall constitute a violation of the permit.

2. *Adverse Impact*

The permittee shall take all reasonable steps to minimize any adverse impact on waters of the State resulting from noncompliance with any effluent limitations specified in this permit, including such special or additional monitoring as may be required by the Department or may be necessary to determine the nature and impact of the noncomplying discharge.

3. *Removed Substances*

Solids, sludges, filter backwash or other pollutants removed from or resulting from treatment or control of wastewaters or intake waters shall be stored and disposed of in a manner such as to prevent any pollutant from such materials from entering the waters of the State. Land disposal of treatment plant solids and sludges shall be either at a site or operation licensed by the Department under Chapter NR 151,Wisconsin Administrative Code, or in accordance with a sludge disposal plan approved by the Department.

4. *Right of Entry*

The permittee shall allow authorized representatives of the Department of Natural Resources, and the Adminis-

trator of the United States Environmental Protection Agency or his authorized representatives, upon the presentation of credentials:

a. To enter upon the permittee's premises where an effluent source is located or in which any records are required to be kept under the terms and conditions of this permit; and

b. At reasonable times to have access to and copy any records required to be kept under the terms and conditions of this permit; to inspect any monitoring equipment or monitoring method required in this permit; and to sample any wastewaters.

5. *Permit Modification*

After notice and opportunity for a hearing as provided in Section 147.03, Wisconsin Statutes, this permit may be modified, suspended, or revoked in whole or in part during its term for cause including, but not limited to, the following:

a. Violation of any terms or conditions of this permit;

b. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts; or

c. A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

6. *Toxic Pollutants*

Nothing in this permit shall be construed to authorize the discharge of any toxic pollutant or combination of pollutants in amounts or concentrations which exceed any applicable toxic effluent standard or prohibition, including

any schedule of compliance specified in any such effluent standard or prohibition, promulgated under Section 147.07 (1), Wisconsin Statutes.

If a toxic effluent standard or prohibition, including any schedule of compliance specified in such effluent standard or prohibition, is promulgated under Section 147.07(1), Wisconsin Statutes, for a toxic pollutant or combination of pollutants which is present in the discharge and such standard or prohibition is more stringent than any limitation for such pollutant in this permit, this permit shall be revised or modified in accordance with the toxic effluent standard or prohibition.

7. *Civil and Criminal Liability*

Except as provided in permit conditions on "Bypassing" (Part I, 23) and "Power Failures" (Part I, 24), nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties under Section 147.21, Wisconsin Statutes, for noncompliance with the terms and conditions of this permit.

8. *Oil and Hazardous Substance Liability*

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Federal Water Pollution Control Act (33 U.S.C. Section 1321).

9. *State Laws*

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any other applicable State law or regulation.

10. *Property Rights*

The issuance of this permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.

11. *Severability*

The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

12. *Schedule of Compliance Progress Reports*

No later than 14 calendar days following a date identified in any schedule of compliance in Part II, the permittee shall submit either a report of progress or, in the case of specific actions being required by identified dates, a written notice of compliance or noncompliance. In the latter case, the notice shall include the cause of noncompliance, any remedial actions taken, and the probability of meeting the next scheduled requirements.

13. *Test Procedures*

Test procedures used for the analysis of pollutants shall be those listed in Chapter NR 219, Wisconsin Administrative Code, or an alternate method authorized in Part II.

14. *Recording of Results*

For each measurement or sample taken pursuant to the requirements of this permit, the permittee shall record the following information:

a. The exact place, date, and time of sampling;

b. The dates the analyses were performed;

c. The person(s) who performed the analyses;

d. The analytical techniques or methods used; and

e. The results of all required analyses.

15. *Additional Monitoring by Permittee*

If the permittee monitors any pollutant at the location(s) designated herein more frequently than required by this permit, using approved analytical methods as specified in Chapter NR 219, the results of such monitoring shall be included in the Discharge Monitoring Report Form 3200-28. Such increased frequency shall also be indicated.

16. *Records Retention*

All records and information resulting from the monitoring activities required by this permit including all records of analysis performed and calibration and maintenance of instrumentation and recordings from continuous monitoring instrumentation shall be retained for a minimum of three (3) years, or longer if requested by the Department of Natural Resources.

17. *Construction of Onshore or Offshore Structures*

This permit does not authorize or approve the construction of any onshore or offshore physical structure of facilities or the undertaking of any work in any navigable waters.

18. *Confidential Information*

Except for data determined to be confidential under Section 147.08(2)(c), Wisconsin Statutes, all monitoring reports required by this permit shall be available for public inspection at the headquarters of U.S. EPA Region V and the Department of Natural Resources. Knowingly making any false statement on any such report may result in the im-

position of criminal penalties as provided for in Section 147.21, Wisconsin Statutes.

19. *Transfer of Control of Operation*

In the event of a transfer of control of operation of the facility from which the permitted discharges emanate to a person not named on page one (1) of this permit, the permittee prior to such transfer shall notify his successor by letter that this permit is not transferable and that prior to any discharge after such transfer, a new WPDES permit must be obtained. A copy of this letter shall be forwarded to the Department of Natural Resources, WPDES Permit Section, Box 450, Madison, Wisconsin 53701.

20. *Change in Discharge*

Facility modifications, additions, and/or expansions that increase the plant capacity must be reported to the Department and this permit then modified or reissued to reflect such changes. Any anticipated change in the facility discharge, including any new significant industrial discharge or significant changes in the quantity or quality of existing industrial discharges of pollutants must be reported to the Department. Modifications to the permit may then be made to reflect any necessary changes in permit conditions, including any necessary effluent limitations for any pollutants not identified and limited herein. In no case are any new connections, increased flows, or significant changes in influent quality permitted that will cause violation of the effluent limitations specified herein.

21. *Noncompliance Notification*

If for any reason the permittee does not comply with or will be unable to comply with any effluent limitation specified in this permit, or should any unusual or extraordinary

discharge of wastes occur from the facilities herein permitted, the permittee shall provide the Department in writing within five days of such occurrence with the following information:

a. A description of the noncomplying discharge including its impact upon the receiving waters.

b. Cause of noncompliance.

c. Anticipated time the condition of noncompliance is expected to continue, or if such condition has been corrected, the duration of the period of noncompliance.

d. Steps taken by the permittee to reduce and eliminate the noncomplying discharge.

e. Steps to be taken by the permittee to prevent recurrence of the condition of noncompliance.

22. *Facility Operation and Quality Control*

All waste collection, control, treatment and disposal facilities shall be operated in a manner consistent with the following:

a. At all times, all facilities shall be operated as efficiently as possible and in a manner which will minimize upsets and discharges of excessive pollutants.

b. The municipal wastewater treatment facility must be under the supervision of a State certified operator as required by Chapter NR 114 of the Wisconsin Administrative Code.

c. Maintenance of treatment facilities that results in degradation of effluent quality shall be scheduled during non-critical water quality periods and shall be carried out in a manner approved by the Department.

23. *Bypassing*

The diversion or bypass of any discharge at the treatment works is prohibited except (i) an inadvertent bypass lasting no longer than one hour and resulting from equipment damage or temporary power interruption, or (ii) an unavoidable bypass necessary to prevent loss of life or severe property damage, or (iii) a bypass of excessive storm drainage or runoff which would damage any facilities necessary for compliance with the effluent limitations and

prohibitions of this permit. In the event of occurrence of a bypass described by (ii) or (iii) the permittee shall immediately notify the Department District Office by telephone of such occurrence. In addition, the permittee shall notify the Department of Natural Resources, WPDES Permit Section and the Administrator of the U.S. EPA—Region V in writing of each such diversion or bypass by letter within 72 hours.

24. *Power Failures*

The permittee is responsible for maintaining adequate safeguards to prevent the discharge of untreated or inadequately treated wastes during electrical power failure either by means of alternate power sources, standby generators or retention of inadequately treated effluent. Should the treatment works not have the above capabilities at the time of permit issuance, the permittee must furnish within 120 days to the Department, for approval, plans for such facilities and an implementation schedule for their installation.

25. *Pretreatment*

The permittee shall require any industrial user of the permitted facility to provide pretreatment as required under

Section 147.07(2), Wisconsin Statutes to provide any records, reports or information related to any pretreatment or new source performance standards. Any industrial user of the permitted facility shall be required by the permittee to prepare and submit to the WPDES Permit Section periodic notices of progress toward full compliance with the requirements of Section 147.07(2), Wisconsin Statutes. Such notices shall be submitted at intervals not to exceed 9 months or as required elsewhere in this permit.

26. *Prohibited Wastes*

Under no circumstances shall the permittee allow introduction into the waste treatment system of wastes prohibited by NR 211.10, Wisconsin Administrative Code, which include those

a. Which create a fire or explosion hazard in the treatment works,

b. Which will cause corrosive structural damage to treatment works,

c. Solid or viscous substances in amounts which cause obstructions to the flow in sewers or interference with the proper operation of the treatment works,

d. Wastewaters at a flow rate and/or pollutant discharge rate which is excessive over relatively short time periods so as to cause a loss of treatment efficiency,

e. New wastes or increased volumes or quantities of wastes from major contributing industries in such volumes or quantities as to overload the treatment works or cause a loss of treatment efficiency.

27. *Definition Terms*

(i) For those terms used in Parts I and II which are defined in Section 147.015, Wisconsin Statutes, the meanings of that Section shall apply.

(ii) As used in Daily Effluent Limitations, Part II:

(1) "Average" means the arithmetic mean of daily monitoring test results obtained during a calendar month for the given parameter; that is the total of such daily results, in pounds per day, milligrams per

liter, or other appropriate unit divided by the number of days for which results are totaled. For example, if a facility operates or discharges and monitors 30 days during a month the daily average is the sum of daily values in pounds per day, milligrams per liter, or other appropriate unit divided by 30 for each parameter, but if one day's result is missing for any parameter the divisor in that case is 29.

(2) "Maximum" means the highest daily monitoring test result, in pounds per day, milligrams per liter, or other appropriate unit during the calendar month for the given parameter.

(3) "Minimum" means the lowest daily monitoring test result, in the appropriate unit, during the calendar month for the given parameter.

(4) The "average" for fecal coliform bacteria shall be the geometric mean of the samples collected in a reported period.

SPECIAL CONDITIONS

Initial

A. Effluent Limitations and Monitoring Requirements

(1) During the period beginning on the effective date of the permit and lasting until December 31, 1974 the permittee is authorized to discharge from outfall serial number 002 (treatment plant outfall).

(2) This discharge shall be limited and monitored by the permittee as specified below.

(a) There shall be no discharge of floating solids or visible foam in other than trace amounts.

(b) Samples taken in compliance with the monitoring requirements specified below shall be taken at locations prescribed in Part II, E.

Effluent Characteristic	Daily Effluent Limitations					Monitoring Requirements	
	Quantity-kg/day (lbs/day)		Other Limitations (Specify Units)				
	Average*	Maximum	Minimum	Average	Maximum	Sample Frequency	Sample Type
Total Flow	—	—	—	—	—	Daily	Continuous
BOD_5 (Monthly)	28,335 (62,550)	—	—	125 mg/l	—	Daily	24 hr. composite
BOD_5 (Weekly)	42,616 (94,075)	—	—	188 mg/l	—	Daily	24 hr. composite
Suspended Solids (Monthly)	21,534 (47,538)	—	—	95 mg/l	—	Daily	24 hr. composite
Suspended Solids (Weekly)	32,415 (71,557)	—	—	143 mg/l	—	Daily	24 hr. composite
pH	—	—	6.0	—	9.0	2xDaily	Grab
Fecal Coliform (Monthly)	—	—	—	200/100 ml	—	2xWeekly	Grab
Fecal Coliform (Weekly)	—	—	—	400/100 ml	—	2xWeekly	Grab

*Load limitations have been calculated using a flow of 60 MGD.

B. Effluent Limitations and Monitoring Requirements

(1) During the period beginning on January 1, 1975 and lasting until June 30, 1975 the permittee is authorized to discharge from outfall serial number 002.

(2) This discharge shall be limited and monitored by the permittee as specified below.

(a) There shall be no discharge of floating solids or visible foam in other than trace amounts.

(b) Samples taken in compliance with the monitoring requirements specified below shall be taken at locations prescribed in Part II, E.

	Daily Effluent Limitations					Monitoring Requirements	
	Quantity-kg/day (lbs/day)		Other Limitations (Specify Units)				
Effluent Characteristic	Average*	Maximum	Minimum	Average	Maximum	Sample Frequency	Sample Type
Total Flow	—	—	—	—	—	Daily	Continuous
BOD_5	13,650 (30,000)	—	—	30 mg/l	—	Daily	24 hr. composite
BOD_5 (Weekly)	20,450 (45,000)	—	—	45 mg/l	—	Daily	24 hr. composite
Suspended Solids (Monthly)	13,650 (30,000)	—	—	30 mg/l	—	Daily	24 hr. composite
Suspended Solids (Weekly)	20,450 (45,000)	—	—	45 mg/l	—	Daily	24 hr. composite
pH	—	—	6.0	—	9.0	2xDaily	Grab
Fecal Coliform (Monthly)	—	—	—	200/100 ml	—	2xWeekly	Grab
Fecal Coliform (Weekly)	—	—	—	400/100 ml	—	2xWeekly	Grab
Total Phosphorus (Monthly)	1,365 (3,000)	—	—	3 mg/l	—	1xDaily	24 hr. composite
Total Residual Chlorine**	—	—	—	—	—	Daily	Grab
Free Available Chlorine***	—	—	—	—	—	2xWeekly	Grab

*Load limitations have been calculated using a flow of 120 MGD.

**Total residual chlorine shall be monitored using the amperometric titration method.

***Free available chlorine shall be monitored using both the orthotolidine method and the amperometric titration method.

C. Effluent Limitations and Monitoring Requirements

(1) During the period beginning on July 1, 1975 and lasting until the expiration date the permittee is authorized to discharge from outfall serial number 002.

(2) This discharge shall be limited and monitored by the permittee as specified below.

(a) There shall be no discharge of floating solids or visible foam in other than trace amounts.

(b) Samples taken in compliance with the monitoring requirements specified below shall be taken at locations prescribed in Part II, E.

Effluent Characteristic	Daily Effluent Limitations: Quantity-kg/day (lbs/day) Average*	Quantity-kg/day (lbs/day) Maximum	Other Limitations (Specify Units) Minimum	Other Limitations (Specify Units) Average	Other Limitations (Specify Units) Maximum	Monitoring Requirements: Sample Frequency	Monitoring Requirements: Sample Type
Total Flow	—	—	—	—	—	Daily	Continuous
BOD_5	13,650 (30,000)	—	—	30 mg/l	—	Daily	24 hr. composite
BOD_5 (Weekly)	20,450 (45,000)	—	—	45 mg/l	—	Daily	24 hr. composite
Suspended Solids (Monthly)	13,650 (30,000)	—	—	30 mg/l	—	Daily	24 hr. composite
Suspended Solids (Weekly)	20,450 (45,000)	—	—	45 mg/l	—	Daily	24 hr. composite
pH	—	—	6.0	—	9.0	2xDaily	Grab
Fecal Coliform (Monthly)	—	—	—	200/100 ml	—	2xWeekly	Grab
Fecal Coliform (Weekly)	—	—	—	400/100 ml	—	2xWeekly	Grab
Total Phosphorus (Monthly)	455 (1,000)	—	—	1 mg/l	—	1xDaily	24 hr. composite
Total Residual Chlorine**	—	—	—	—	—	Daily	Grab
Free Available Chlorine***	—	—	—	—	—	2xWeekly	Grab

*Load limitations have been calculated using a flow of 120 MGD.

**Total residual chlorine shall be monitored using the amperometric titration method.

***Free available chlorine shall be monitored using both the orthotolidine method and the amperometric titration method.

D. Beginning January 1, 1975 the arithmetic mean of the values for effluent samples of 5-day BOD and suspended solids collected in a reporting period shall not exceed 15 percent of the arithmetic mean of the values for influent samples collected at approximately the same time during the same period (85 percent removal).

E. Sample Collection Locations

1. Influent samples (24 hour composites, daily) shall be taken at a point upstream from the introduction of any recycled flows. Influent samples shall be analyzed for BOD, Suspended Solids and Total Phosphorus as a minimum.

2. Effluent samples (24 hour composites, daily) shall be taken at a point following disinfection. Effluent samples shall be analyzed for BOD, Suspended Solids, pH, Fecal Coliform, Total Phosphorus, Total Residual Chlorine, and Free available Chlorine as a minimum, in accordance with the sampling frequency contained in part II, paragraphs A and B.

E. MONITORING AND RECORDING

1. *Sampling Requirements*

Unless specified otherwise herein, samples shall be taken in accordance with Chapter NR 218 of the Wisconsin Administrative Code.

2. *Reporting*

a. Monitoring reports and reports required by Section 12, 20, 21 and 23 of Part I of this permit shall be signed by a principal executive officer, a ranking elected official, or other duly authorized representative.

b. Monitoring results obtained during the previous month shall be summarized and reported on a Discharge Monitor-

ing Report Form, postmarked no later than the 15th day of the month following the completed reporting period. The first report is due on February 15, 1975. Duplicate signed copies of these shall be submitted to the:

Wisconsin Department of Natural Resources
Southeast District
Division of Environmental Protection (Permits)
11611 West North Avenue
Milwaukee, Wisconsin 53226

c. All other reports required herein shall be submitted to the:

Wisconsin Department of Natural Resources
WPDES Permit Section
Post Office Box 450
Madison, Wisconsin 53701

3. *Schedule of Compliance**

The permittee shall achieve compliance with the effluent limitations contained in Part II in accordance with the following schedule:

a. Attain operational level July 1, 1975

4. Additional monitoring requirements to be reported to the Wisconsin Department of Natural Resources, WPDES Permit Section:

a. The influent 5-day BOD and suspended solids shall be monitored on the same frequency with the same sample type as required of the effluent.

b. Flow measurement of the wastewater volume received at the treatment plant, including any bypassed flow, shall be monitored continuously.

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*The permittee shall comply with the above schedule of compliance for upgrading the South Shore Wastewater Treatment Plant to provide adequate phosphorus removal.

c. The permittee shall report to the Wisconsin Department of Natural Resources when the average daily wastewater flow to the treatment plant or the 5-day biochemical oxygen demand loading exceeds 100 $X10^6$ gpd and 232,000 pounds/day respectively for a three month consecutive period.

5. *Disposal of Collected Solids*—The permittee shall provide the Wisconsin Department of Natural Resources a report by March 31, 1975 containing data on the disposal of collected solids. The report shall specifically contain as a minimum—

a. The average volume of sludge disposed on a monthly basis,

b. The type of sludge treatment effected prior to its disposal,

c. The means by which the sludge is disposed and

d. The exact location of all sludge disposal areas.

Based upon an analysis of this report, this permit may be revised or modified to include provisions for the disposal of collected solids.

6. Requirements for effluent limitations on pollutants attributable to industrial users:

a. Effluent limitations on pollutants from this discharger are listed in this permit. It is apparent that other pollutants attributable to inputs from significant industrial users of the municipal system are also present in the permittee's discharge. At such time as sufficient information becomes available to establish limitations for such pollutants, and after notice and opportunity for public hearing as provided in Chapter NR 3 of the Wisconsin Administrative Code, this

permit may be revised to specify effluent limitations for any or all of such other pollutants.

b. As required by Chapter NR 211 of the Wisconsin Administrative Code, the permittee shall, with respect to all major contributing industries impose such pretreatment requirements on such industrial users as may be necessary to assure compliance by the permittee with all applicable effluent limitations set forth in this permit. A major contributing industry is one that: (a) has a flow of 50,000 gallons or more per average work day; (b) has a flow greater than five percent of the flow carried by the municipal system receiving the waste; (c) has a material in its discharge included on a list of toxic pollutants issued under Section 147.07(1), Wisconsin Statutes, or (d) has significant impact, either singularly or in combination with other contributing industries, on the treatment works or the quality of its effluent.

Starting on December 31, 1975, the permittee shall provide a report once every three months to the Department WPDES Permit Section regarding the pretreatment requirements which have been imposed on each major industrial user and the results achieved therefrom.

c. Immediately upon issuance of this permit, the permittee shall establish and implement a procedure to obtain from all significant industrial users specific information on the quality and quantity of effluents introduced by such industrial users and their impact on the overall municipal discharge. The form prescribed in Chapter NR 202 of the Wisconsin Administrative Code shall be submitted to the Department by the permittee for each significant industrial user which (1) discharges at least 10,000 gallons of

effluent on any day of the year into this permitted treatment works, (2) has a flow greater than five percent of the total flow carried by the municipal system receiving the waste, (3) has a toxic material in its discharge, or (4) has been notified in writing by the Department that it is necessary to complete this form. All NR 202 forms shall be submitted to the Department on a quarterly basis beginning December 31, 1975; quarterly reports reflecting no change from the previous quarter may simply relate this fact without submitting repetitive data. NR 202 requires significant industrial users to submit to the permittee this form upon request of the permittee.

7. The Sewerage Commission of the City of Milwaukee is required to initiate a program leading to the elimination of all discharge overflow and/or bypass points in the South Shore Collector System at discharge points 020, 022, 025, 027, 028, 033 through 043 and 047 (as identified below) to assure attainment of all applicable Water Quality Standards.

a. On or before December 31, 1975, the permittee shall submit to the Wisconsin Department of Natural Resources a plan for the elimination of all discharge points noted above. Such plan shall include alternative engineering solutions for the elimination of each discharge point, a recommended solution for the elimination of each discharge point, an estimate of cost for the elimination of each discharge point and a time schedule for the elimination of each discharge point. If it is determined by the Department that the plan is incomplete or inadequate, the plan may be returned to the permittee with the reasons therefore, following which the plan shall be modified by the permittee and resubmitted within 60 days. After acceptance by the Department of an adequate plan, this permit may be modified to incorporate the specific provisions and time schedules contained in the plan.

b. On or before June 30, 1975, the permittee shall complete "Attachment A" for each discharge identified below, and submit the completed forms to the Department.

c. On or before March 31, 1975, the permittee shall identify to the Department 5 discharge points (chosen from those identified below) which are considered by the permittee to have the most significant impact on water quality. Following concurrence by the Department, the permittee shall by December 31, 1975, install equipment to continuously measure all flows discharged from the 5 selected discharges and shall install equipment to adequately sample the flow discharged. Beginning March 31, 1976, and every three months thereafter until the discharges are eliminated, the permittee shall submit a report to the Department containing data on the date of discharge, volume of discharge and sample analysis for each discharge. Each sample shall be analyzed for BOD, Suspended Solids, pH, Fecal Coliform and any other parameters that the Department may require.

Part II. Page 8 of 8

DISCHARGE BYPASS AND/OR OVERFLOW POINTS IN THE SOUTH SHORE COLLECTOR SYSTEM

Serial No.	Location
020	S. Howell Avenue at E. Grange Avenue
022	Menomonee River Parkway at W. Center Street
025	S. 35th Street at W. Manitoba Street
027	W. Hampton Avenue at N. 63rd Street Ext'd
028	S. 84th Street at W. Adler Street Ext'd
033	W. Fisher Parkway at N. 106th Street

034	Honey Creek Parkway at W. Portland Avenue
035	Honey Creek Parkway at W. Wisconsin Avenue
036	Menomonee River Parkway, 600 feet S. of W. North Avenue
037	Menomonee River Parkway, 300 feet E. of N. 68th Street
038	N. Martha Washington Drive, 450 feet South of W. Vliet Street
039	N. 62nd Street, 258 feet S. of W. Martin Drive
040	N. 62nd Street and W. Martin Drive
041	S. 60th Street of S. side of the Kinnickinnic River
042	S. 79th Street Ext'd at W. Dickinson Street Ext'd
043	W. Lincoln Avenue at 565 feet W. of S. 43rd Street
047	W. Oklahoma Avenue, 100 feet W. of S. 74th Street

"ATTACHMENT A"

1. Discharge Serial Number:

2. Discharge Location: _____

3. Name of Receiving Water: _____

4. Occurrence (check when discharge occurs)
   Wet weather _____Yes, _____No
   Dry weather _____Yes, _____No

5. Frequency (Give the actual or approximate number of incidents per year)

   Wet weather _____times per year
   Dry weather _____times per year

6. Duration (Give the average duration per incident in hours)

7. Volume (Give the average volume per incident in thousand gallons)

   Wet weather _____thousand gallons per incident
   Dry weather _____thousand gallons per incident

8. Reason (Give brief reason or justification for discharge)

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES
Box 450—Madison, Wisconsin 53701
L. P. Voight, Secretary

In Reply Refer to: 3420

Certified Mail
Return Receipt Requested

Mr. Robert J. Bochardt
Chief Engineer & General Manager
Sewerage Commission of the City of Milwaukee
P.O. Box 2079
Milwaukee, Wisconsin 53201

RE: Amendment of WPDES Permit No. WI-0024775

Dear Mr. Bochardt:

The Department has discovered that some confusion may exist as to what is actually required under Part II, page 2 of 8, Sample Collection Locations.

The page which is attached, namely, page 4 of 8 of Part II, replaces page 4 of 8 of Part II, of the original permit issued on December 18, 1974. Paragraphs 1 and 2 under Sample Collection Locations have been reworded to clearly indicate what is required. The requirements have not been changed from the issued permit. Please replace the original page with this attached modified page in all copies of the permit which you retain in your records. All discharges from this facility and actions or reports relating thereto shall be in accordance with the terms and conditions of the original permit.

The WPDES permit program has been approved by the Administrator of the U.S. Environmental Protection Agency pursuant to Section 402(b) of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. Section 1342(b)). Therefore, this permit is subject to enforcement

under Section 147.21 and 147.29, Wisconsin Statutes and Section 309 of the Federal Act (33 U.S.C. Section 1319).

/s/ Oliver D. Williams
Oliver D. Williams
Acting Administrator
Division of Environmental Standards

Dated January 9, 1975

cc: U.S. Environmental Protection Agency
Attn: Permits Branch
Southeastern District

SPECIAL CONDITIONS

D. Beginning January 1, 1975 the arithmetic mean of the values for effluent samples of 5-day BOD and suspended solids collected in a reporting period shall not exceed 15 percent of the arithmetic mean of the values for influent samples collected at approximately the same time during the same period (85 percent removal).

E. Sample Collection Locations

1. Influent samples shall be taken at a point upstream from the introduction of any recycled flows. Influent samples shall be analyzed for BOD, suspended solids, and total phosphorus as a minimum. Influent samples shall be collected on the same frequency and with the same sample type as the effluent.

2. Effluent samples shall be taken at a point following disinfection. Effluent samples shall be analyzed for BOD, suspended solids, pH, fecal coliform, total phosphorus, total residual chlorine, and free available chlorine as a minimum, in accordance with the sampling frequency and sample type contained in Part II, paragraphs A, B and C.

Plaintiff's Exhibit 64

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES
Box 450—Madison, Wisconsin 53701
L. P. Voight, Secretary

In Reply Refer to: 3420

Certified Mail
Return Receipt Requested

Mr. Herbert A. Goetsch
Commissioner of Public Works
City of Milwaukee
841 North Broadway—Room 516
Milwaukee, Wisconsin 53202

Re: WPDES Permit No. WI-0026875

Dear. Mr. Goetsch:

Your application WI-0026875 for a Wisconsin Pollutant Discharge Elimination System (WPDES) Permit has been processed in accordance with Section 147.02 and 147.025, Wisconsin Statutes.

The enclosed WPDES permit covers the discharges from the facility located at City of Milwaukee Sanitary Sewer crossovers, combined sewer crossovers, and combined sewer overflows into Milwaukee River, Kinnickinnic River, Menomonee River, South Menomonee Canal-Branch of Menomonee River, Burnham's Canal-Branch of Menomonee River and Lake Michigan. All discharges from this facility and actions or reports relating thereto shall be in accordance with the terms and conditions of this permit.

The WPDES permit program has been approved by the Administrator of the U.S. Environmental Protection Agency pursuant to Section 402(b) of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. Section

1342(b)). The terms and conditions of this permit are accordingly subject to enforcement under Section 147.21 and 147.29, Wisconsin Statutes and Section 309 of the Federal Act (33 U.S.C. Section 1319).

/s/ OLIVER D. WILLIAMS
Oliver D. Williams
Acting Administrator
Division of Environmental Standards

Dated December 18, 1974

Enclosures
Permit
Reporting Forms

cc: U.S. Environmental Protection Agency
ATTN: Permits Branch
Southeast District

Part II, Page 1 of 7
Wisconsin Permit No. WI-0026875

SPECIAL CONDITIONS

A. Sanitary Sewer Crossovers (Gravity) and Electrically Operated Relief Pumps—Discharge Serial Number 001 through 089.

The City of Milwaukee is required to initiate a program leading to the elimination of the sanitary sewer crossovers (gravity) and the electrically operated relief pumps at discharge points 001 through 089 (as identified below) to assure attainment of all applicable Water Quality Standards.

1. On or before December 31, 1975, the City shall submit to the Wisconsin Department of Natural Resources a plan for the elimination of discharge points 001 through 089. Such plan shall include alternative engineering solutions for the elimination of each discharge point, a recommended solution for the elimination of each discharge point, an estimate of cost for the elimination of each discharge point and a time schedule for the elimination of each discharge point. If it is determined by the Department that the plan is incomplete or inadequate, the plan may be returned to the City with the reasons therefore, following which the plan shall be modified by the City and resubmitted within 60 days. After acceptance by the Department of an adequate plan, this permit may be modified to incorporate the specific provisions and time schedules contained in the plan.

2. On or before March 31, 1975, the City shall submit to the Department a listing of discharge 001 through 089 which identifies which of the discharges take place under normal dry weather conditions and which take place only under wet weather conditions.

3. On or before June 30, 1975, the City shall complete "Attachment A" for each discharge 001 through 089, and submit the completed forms to the Department.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

NOTICE OF FINAL DETERMINATION TO ISSUE A WISCONSIN POLLUTANT DISCHARGE ELIMINATION SYSTEM (WPDES) PERMIT

Number of Notice of Final Determination: 4WM-0171B

Application Number: WI-0026875

Name and Address of Applicant:

City of Milwaukee
841 North Broadway—Room 516
Milwaukee, Wisconsin 53202

Notice of Final Determination Issued On: December 18, 1974

Permit Number: WI-0026875

Name and Address of Facility Where Discharge Occurs:

City of Milwaukee Sanitary Sewer crossovers, combined sewer crossovers and combined sewer overflows

Public Informational Hearing Held On: October 2, 1974

Date of Issuance and Effectiveness of the Permit:

December 18, 1974

Date of Expiration of the Issued Permit: June 30, 1977

Activities of Operations Resulting in Discharge: Existing discharge of untreated wastewater from sanitary sewer crossovers, combined sewer crossovers and combined sewer overflows.

4. On or before September 30, 1976, the City shall prepare and submit to the Department an Infiltration/Inflow Analysis for the separate sanitary sewer system. The Analysis shall be based on the Federal Guidelines for Sewer System Evaluation, March, 1974, EPA 520/9-74-018. On or before March 31, 1975, the City shall submit to the Department a plan of study for conducting the Infiltration/Inflow Analysis; such plan of study to include a time schedule for the accomplishment of specific tasks. Based on the results of the Analysis, a more detailed sewer system evaluation survey may be required.

5. On or before March 31, 1975, the City shall identify to the Department 10 discharge points (chosen from 001 through 089) which are considered by the City to have the most significant impact on water quality. Following concurrence by the Department, the City shall by December 31, 1975, install equipment to continuously measure all flows discharged from the 10 selected discharges and shall install equipment to adequately sample the flow discharged. Beginning on March 31, 1976, and every three months thereafter until the discharges are eliminated, the City shall submit a report to the Department containing data on the date of discharge, volume of discharge and sample analysis for each discharge. Each sample shall be analyzed for BOD, Suspended Solids, pH, Fecal Coliform and any other parameter that the Department may require.

Serial No.	Location
001	N. 25th Street and W. Hope Avenue
002	N. 30th Street and W. Hope Avenue
003	N. 31st Street (Ext.) and W. Hope Avenue (Ext.)

Receiving Water: Milwaukee River, Kinnickinnic River, Menomonee River, South Menomonee Canal-Branch of Menomonee River, Burnham's Canal-Branch of Menomonee River and Lake Michigan.

Following a public informational hearing, the above named applicant has been issued a WPDES permit by the Department to discharge into the above named receiving water. The Department has issued this WPDES permit pursuant to the authority of Section 147.02, Wisconsin Statutes.

A summary of the significant changes which have been made in the terms and conditions set forth in the draft permit is as follows:

1. The City must submit a plan by December 31, 1975 for eliminating its gravity sanitary sewer crossovers and electrically operated relief pumps.

2. By March 31, 1975, the City must identify which of its discharges take place under normal dry weather conditions.

3. By March 31, 1975 the City must identify to the Department 25 discharge points which are considered by the City to have the most significant impact on water quality. The City will subsequently be required to monitor these points for flow, BOD_5, Suspended Solids, pH, Fecal Coliform and any other parameter that the Department may require.

4. The City is to cooperate with and assist the Sewerage Commission of the City of Milwaukee in the conduct and completion of the facilities planning as provided in Treatment Works Grant C550772-01. The facilities planning elements include a feasibility study, cost-effectiveness analysis and environmental assessment for elimination or control of the discharges from the combined sewers.

As provided by Section 147.20, Wisconsin Statutes, persons desiring further adjudicative review of this final determination to issue this WPDES permit may request a public adjudicatory hearing within 60 days of the date of issuance of this final determination. Such requests shall be made in

conformance with Section 147.20, Wisconsin Statutes, and Chapter NR 3, Wisconsin Administrative Code. Further information regarding the conduct and nature of public adjudicatory hearings may be obtained by contacting the Department of Natural Resources, WPDES Permit Section.

The application, the proposed permit including effluent limitations and special conditions, and other information are on file and may be inspected and copied in Pyare Building, 4610 University Avenue, Madison, Wisconsin between the hours of 9:00 a.m. and 3:30 p.m., Monday through Friday, holidays excepted. Comments as received will be made a part of that file.

Copies of the information in the WPDES file for this applicant may be obtained by calling 608-266-3221 or by writing to the Department, WPDES Permit Section, Box 450, Madison, Wisconsin 53701. Reasonable costs will be charged for requests for copies of information other than the public notices and fact sheets.

Permit No. WI-0026875
Application No. WI-0026875

PERMIT TO DISCHARGE UNDER THE WISCONSIN POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of Chapter 147, Wisconsin Statutes,

THE CITY OF MILWAUKEE

is permitted to discharge from ITS SANITARY SEWER CROSSOVER, COMBINED SEWER CROSSOVERS, AND COMBINED SEWER OVERFLOWS

to MILWAUKEE RIVER, KINNICKINNIC RIVER, MENOMONEE RIVER, SOUTH MENOMONEE CANAL, BURNHAM'S CANAL AND LAKE MICHIGAN

in accordance with the effluent limitations, monitoring requirements and other conditions set forth in Parts I and II hereof.

This permit shall become effective on the date of signature.

This permit to discharge shall expire at midnight, June 30, 1977.

Permittee shall not discharge after the date of expiration. If the permittee wishes to continue to discharge after this expiration date he shall file an application for reissuance of his permit in accordance with the requirements of Chapter NR 200, Wisconsin Administrative Code, at least 180 days prior to this expiration date.

State of Wisconsin Department of Natural Resources
For the Secretary

By /s/ OLIVER D. WILLIAMS
Oliver D. Williams
Acting Administrator
Division of Environmental Standards

Dated this 18th day of December, 1974

GENERAL CONDITIONS

1. *Compliance*

All discharges authorized herein shall be consistent with the terms and conditions of this permit. The discharge of any pollutant identified in this permit more frequently than or at a level in excess of that authorized shall constitute a violation of the permit.

2. *Adverse Impact*

The permittee shall take all reasonable steps to minimize any adverse impact on waters of the State resulting from noncompliance with any effluent limitations specified in this permit, including such special or additional monitoring as may be required by the Department or may be necessary to determine the nature and impact of the noncomplying discharge.

3. *Removed Substances*

Solids, sludges, filter backwash or other pollutants removed from or resulting from treatment or control of wastewaters or intake waters shall be stored and disposed of in a manner such as to prevent any pollutant from such materials from entering the waters of the State. Land disposal of treatment plant solids and sludges shall be either at a site or operation licensed by the Department under Chapter NR 151,Wisconsin Administrative Code, or in accordance with a sludge disposal plan approved by the Department.

4. *Right of Entry*

The permittee shall allow authorized representatives of the Department of Natural Resources, and the Administrator of the United States Environmental Protection

Agency or his authorized representatives, upon the presentation of credentials:

a. To enter upon the permittee's premises where an effluent source is located or in which any records are required to be kept under the terms and conditions of this permit; and

b. At reasonable times to have access to and copy any records required to be kept under the terms and conditions of this permit; to inspect any monitoring equipment or monitoring method required in this permit; and to sample any wastewaters.

5. *Permit Modification*

After notice and opportunity for a hearing as provided in Section 147.03, Wisconsin Statutes, this permit may be modified, suspended, or revoked in whole or in part during its term for cause including, but not limited to, the following:

a. Violation of any terms or conditions of this permit;

b. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts; or

c. A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

6. *Toxic Pollutants*

Nothing in this permit shall be construed to authorize the discharge of any toxic pollutant or combination of pollutants in amounts or concentrations which exceed any applicable toxic effluent standard or prohibition, including any schedule of compliance specified in any such effluent standard or prohibition, promulgated under Section 147.07 (1), Wisconsin Statutes.

If a toxic effluent standard or prohibition, including any schedule of compliance specified in such effluent standard or prohibition, is promulgated under Section 147.01(1), Wisconsin Statutes, for a toxic pollutant or combination of pollutants which is present in the discharge and such standard or prohibition is more stringent than any limitation for such pollutant in this permit, this permit shall be revised or modified in accordance with the toxic effluent standard or prohibition.

7. *Civil and Criminal Liability*

Except as provided in permit conditions on "Bypassing" (Part I, 23) and "Power Failures" (Part I, 24), nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties under Section 147.21, Wisconsin Statutes, for noncompliance with the terms and conditions of this permit.

8. *Oil and Hazardous Substance Liability*

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Federal Water Pollution Control Act (33 U.S.C. Section 1321).

9. *State Laws*

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any other applicable State law or regulation.

10. *Property Rights*

The issuance of this permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize any injury to private

property or any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.

11. *Severability*

The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

12. *Schedule of Compliance Progress Reports*

No later than 14 calendar days following a date identified in any schedule of compliance in Part II, the permittee shall submit either a report of progress or, in the case of specific actions being required by identified dates, a written notice of compliance or noncompliance. In the latter case, the notice shall include the cause of noncompliance, any remedial actions taken, and the probability of meeting the next scheduled requirements.

13. *Test Procedures*

Test procedures used for the analysis of pollutants shall be those listed in Chapter NR 219, Wisconsin Administrative Code, or an alternate method authorized in Part II.

14. *Recording of Results*

For each measurement of sample taken pursuant to the requirements of this permit, the permittee shall record the following information:

a. The exact place, date, and time of sampling;

b. The dates the analyses were performed;

c. The person(s) who performed the analyses;

d. The analytical techniques or methods used; and

e. The results of all required analyses.

15. *Additional Monitoring by Permittee*

If the permittee monitors any pollutant at the location(s) designated herein more frequently than required by this permit, using approved analytical methods as specified in Chapter NR 219, the results of such monitoring shall be reported to the Department on a quarterly basis.

16. *Records Retention*

All records and information resulting from the monitoring activities required by this permit including all records of analysis performed and calibration and maintenance of instrumentation and recordings from continuous monitoring instrumentation shall be retained for a minimum of three (3) years, or longer if requested by the Department of Natural Resources.

17. *Construction of Onshore or Offshore Structures*

This permit does not authorize or approve the construction of any onshore or offshore physical structure of facilities or the undertaking of any work in any navigable waters.

18. *Confidential Information*

Except for data determined to be confidential under Section 147.08(2)(c), Wisconsin Statutes, all monitoring reports required by this permit shall be available for public inspection at the headquarters of U.S. EPA Region V and the Department of Natural Resources. Knowingly making any false statement on any such report may result in the imposition of criminal penalties as provided for in Section 147.21, Wisconsin Statutes.

19. *Transfer of Control of Operation*

In the event of a transfer of control of operation of the facility from which the permitted discharges emanate to a person not named on page one (1) of this permit, the permittee prior to such transfer shall notify his successor by letter that this permit is not transferable and that prior to any discharge after such transfer, a new WPDES permit must be obtained. A copy of this letter shall be forwarded to the Department of Natural Resources, WPDES Permit Section, Box 450, Madison, Wisconsin 53701.

20. *Change in Discharge*

Facility modifications, additions, and/or expansions that increase the plant capacity must be reported to the Department and this permit then modified or reissued to reflect such changes. Any anticipated change in the facility discharge, including any new significant industrial discharge or significant changes in the quantity or quality of existing industrial discharges of pollutants must be reported to the Department. Modifications to the permit may then be made to reflect any necessary changes in permit conditions, including any necessary effluent limitations for any pollutants not identified and limited herein. In no case are any new connections, increased flows, or significant changes in influent quality permitted that will cause violation of the effluent limitations specified herein.

21. *Noncompliance Notification*

If for any reason the permittee does not comply with or will be unable to comply with any effluent limitation specified in this permit, or should any unusual or extraordinary discharge of wastes occur from the facilities herein permitted, the permittee shall provide the Department in writ-

ing within five days of such occurrence with the following information:

a. A description of the noncomplying discharge including its impact upon the receiving waters.

b. Cause of noncompliance.

c. Anticipated time the condition of noncompliance is expected to continue, or if such condition has been corrected, the duration of the period of noncompliance.

d. Steps taken by the permittee to reduce and eliminate the noncomplying discharge.

e. Steps to be taken by the permittee to prevent recurrence of the condition of noncompliance.

22. *Facility Operation and Quality Control*

All waste collection, control, treatment and disposal facilities shall be operated in a manner consistent with the following:

a. At all times, all facilities shall be operated as efficiently as possible and in a manner which will minimize discharges of excessive pollutants.

b. Maintenance of the sewer system that results in discharge of untreated wastes to surface waters shall be scheduled during non-critical water quality periods and shall be carried out in a manner approved by the Department.

23. *Power Failures*

The permittee is responsible for maintaining adequate safeguards to prevent the discharge of untreated or inadequately treated wastes during electrical power failure either by means of alternate power sources, standby generators

or retention of inadequately treated effluent. Should the treatment works not have the above capabilities at the time of permit issuance, the permittee must furnish within 120 days to the Department, for approval, plans for such facilities and an implementation schedule for their installation.

24. *Pretreatment*

The permittee shall require any industrial user of the sewer collection system to provide pretreatment as required under Section 147.07(2), Wisconsin Statutes, to provide any records, reports or information related to any pretreatment or new source performance standards. Any industrial user of the sewer collection system shall be required by the permittee to prepare and submit to the WPDES Permit Section periodic notices of progress toward full compliance with the requirements of Section 147.07(2), Wisconsin Statutes. Such notices shall be submitted at intervals not to exceed nine (9) months or as required elsewhere in this permit.

25. *Prohibited Wastes*

Under no circumstances shall the permittee allow introduction into the sewer collection system wastes prohibited by NR 211.10, Wisconsin Administrative Code, which include those

a. Which create a fire or explosion hazard in the treatment works,

b. Which will cause corrosive structural damage to treatment works,

c. Solid or viscous substances in amounts which cause obstructions to the flow in sewers or interference with the proper operation of the treatment works,

d. Wastewaters at a flow rate and/or pollutant discharge rate which is excessive over relatively short time periods so as to cause a loss of treatment efficiency,

e. New wastes or increased volumes or quantities of wastes from major contributing industries in such volumes or quantities as to overload the treatment works or cause a loss of treatment efficiency.

26. *Definition Terms*

(i) For those terms used in Parts I and II which are defined in Section 147.015, Wisconsin Statutes, the meanings of that Section shall apply.

(ii) As used in Daily Effluent Limitations, Part II:

(1) "Average" means the arithmetic mean of daily monitoring test results obtained during a calendar month for the given parameter; that is the total of such daily results, in pounds per day, milligrams per

liter, or other appropriate unit divided by the number of days for which results are totaled. For example, if a facility operates or discharges and monitors 30 days during a month the daily average is the sum of daily values in pounds per day, milligrams per liter, or other appropriate unit divided by 30 for each parameter, but if one day's result is missing for any parameter the divisor in that case is 29.

(2) "Maximum" means the highest daily monitoring test result, in pounds per day, milligrams per liter, or other appropriate unit during the calendar month for the given parameter.

(3) "Minimum" means the lowest daily monitoring test result, in the appropriate unit, during the calendar month for the given parameter.

(4) The "average" for fecal coliform bacteria shall be the geometric mean of the samples collected in a reported period.

Serial No.	Location
004	N. 31st Street and W. Villard Avenue (12″ diameter crossover)
005	N. 31st Street and W. Villard Avenue (8″ diameter crossover)
006	N. 41st Street and W. Congress Street
007	N. 47th Street and W. Concordia Avenue
008	N. 47th Street and W. Congress Street
009	N. 49th Street and W. Concordia Avenue
010	N. 68th Street and W. Center Street
011	N. 20th Street at W. Fairmont Avenue
012	S. 3rd Street at W. Saveland Avenue
013	N. 76th Street, 200 feet north of Hadley Street
014	N. 79th Street and W. Locust Street
015	W. Capitol Drive (N/S) and N. 31st Street
016	W. Capitol Drive (S/S) and N. 31st Street
017	N. Sherman Boulevard and W. Fond du Lac Avenue
018	S. Whithall Avenue and E. Howard Avenue
019	N. 36th Street between W. Carmen Avenue and W. Florist Avenue
020	E. Howard Avenue at S. Pine Avenue
021	W. Center Street at N. 86th Street
022	N. 35th Street, 40 feet north of W. Oriole Drive
023	S. 35th Street at W. Lakefield Drive
024	W. Center Street at N. 88th Street
025	W. Ruskin Street at S. 38th Street
026	W. Silver Spring Drive at N. 38th Street
027	W. Silver Spring Drive at N. 37th Street
028	W. Silver Spring Drive at N. 36th Street
029	W. Silver Spring Drive at N. 35th Street
030	W. Silver Spring Drive at N. 27th Street
031	N. 89th Street at W. Townsend Street
032	N. 90th Street at W. Townsend Street
033	W. Dickinson Street and S. 62nd Street
034	W. Hope Avenue and N. 47th Street

Serial No.	Location
035	W. Silver Spring Drive and N. 39th Street
036	W. Silver Spring Drive and N. 41st Street
037	W. Stevenson Street and N. 71st Street
038	W. Mt. Vernon Avenue and N. 69th Street
039	W. Morgan Avenue at S. 57th Street
040	W. Hadley Street at N. 80th Street
041	W. Mt. Vernon Avenue at 75 feet east of N. 91st Street
042	N. 41st Street and Congress Street
043	N. 66th Street ½ block between W. Congress Street and W. Ruby Avenue
044	N. 94th Street and W. Townsend Street
045	N. 95th Street and W. Metcalf Pl.
046	E. Armour Avenue 69 feet west of S. Austin Street
047	N. 89th Street and W. Center Street
048	N. 87th Street and W. Center Street
049	N. 44th Street 285 feet south of W. Burleigh Street
050	N. 53rd Street at W. Glendale Avenue
051	N. 53rd Street at W. Courtland Avenue (Ext.)
052	S. Austin Street at W. Dakota Street
053	N. 27th Street 404 feet south of W. Hope Avenue
054	E. Ohio Street and S. Quincy Avenue

055	W. Lawn Avenue and N. Milwaukee River Parkway
056	N. Milwaukee River Parkway and vacated W. Wilson Drive
057	W. Fairmount Avenue and N. 19th Place
058	W. Fairmount Avenue and N. Green Bay Road
059	S. 43rd Street and W. Morgan Avenue
060	N. 20th Street at W. Hampton Avenue (North Side)

Serial No.	Location
061	N. 20th Street at W. Hampton Avenue (South Side)
062	N. 19th Place at W. Fairmount Avenue
063	N. 49th Street at W. Luscher Avenue
064	N. 60th Street at W. Custer Avenue
065	5384 N. 60th Street
066	N. 61st Street at W. Lawn Avenue
067	5373 N. 60th Street
068	5344 N. 60th Street
069	N. 63rd Street at W. Fairmount Avenue
070	N. 64th Street at W. Stark Street
071	5030 N. 55th Street
072	N. 66th Street at W. Ruby Avenue
073	N. 96th Street at W. Auer Avenue
074	N. 99th Street at W. Concordia Avenue
075	S. 46th Street at W. Cleveland Avenue
076	Mid-block W. Lincoln Avenue between S. 36th Street and S. 37th Street
077	N. Milwaukee River Parkway at W. Lawn Avenue
078	N. Milwaukee River Parkway, north of W. Lawn Avenue
079	N. 58th Street at W. Sheridan Avenue
080	S. 72nd Street at W. Honey Creek Parkway
081	S. 77th Street at W. Oklahoma Avenue
082	3253 S. 57th Street
083	S. 54th Street at W. Midland Drive
084	92nd Street at W. Howard Avenue
085	S. Howell Avenue at W. Ramsey Avenue
086	S. Howell Avenue at E. Edgerton Avenue
087	S. Burrell Street at E. Van Norman Avenue
088	W. Monrovia Avenue at W. Crossfield Avenue
089	S. 94th Street at W. Howard Avenue
089a	W. Olive Street at 435′ S.E. at W. Roosevelt Drive
089b	N. 24th Street and W. Hope Avenue
089d	

B. Combined Sewer Crossovers and Overflows—Discharge Serial Number 090 through 213.

The City of Milwaukee is required to initiate a program leading to the attainment of control of overflows from the City's combined sewer system at discharge points 090 through 213 (as identified below), to assure attainment of all applicable Water Quality Standards.

1. The City is to cooperate with and assist the Sewerage Commission of the City of Milwaukee in the conduct and completion of the facilities planning as provided in Treatment Works Grant 0550772-01. The facilities planning elements include a feasibility study, cost-effectiveness analysis and environmental assessment for elimination or control of the discharges from the combined sewers.

2. Beginning on March 31, 1975 and continuing every three months thereafter until completion of the facilities planning, the City shall submit progress reports to the Department of Natural Resources, WPDES Permit Section.

3. On or before March 31, 1975, the City shall submit to the Department a listing of discharges 090 through 213 which identifies which of the discharges take place under normal dry weather conditions and which takes place only under wet weather conditions.

4. On or before June 30, 1975, the City shall complete "Attachment A" for each discharge 090 through 213, and submit the completed forms to the Department.

5. On or before March 31, 1975, the City shall identify to the Department 15 discharge points (chosen from 090 through 213) which are considered by the City to have the most significant impact on water quality. Following concurrence by the Department, the City shall

by Department 31, 1975, install equipment to continuously measure all flows discharged from the 15 selected discharges and shall install equipment to adequately sample the flow discharged. Beginning March 31, 1976, and every three months thereafter until the discharges are eliminated or controlled, the City shall submit a report to the Department containing data on the date of discharge, volume of discharge and sample analysis for each discharge. Each sample shall be analyzed for BOD, Suspended Solids, pH, Fecal Coliform and any other parameter that the Department may require. In the event the facilities planning referred to in (a) above identifies more than 15 discharges which will be monitored, the City shall submit, on a quarterly basis, information on all discharges monitored beginning at the close of the quarter during which the monitoring is initiated.

Combined Sewer Crossovers—Discharge Serial Numbers 090 through 100 inclusive:

Serial No.	Location
090	N. 26th Street and W. Vienna Avenue
091	N. 37th Street 145 feet north of W. Mt. Vernon Avenue
092	N. 38th Street and W. Mt. Vernon Avenue
093	N. 46th Street and W. State Street
094	E. Meinecke Avenue and N. Gordon Place
095	W. Hilda Place and S. 38th Street

096	N. Sherman Boulevard at W. Burleigh Street
097	E. Lincoln Avenue at S. Burrell Street
098	E. Lincoln Avenue 150 feet west of S. Greeley Street

Serial No.	Location
099	E. Lincoln Avenue 450 feet west of S. Greeley Street
100	N. 37th Street 11 feet north of W. Mt. Vernon Avenue

Combined Sewer Overflows to the Milwaukee River—

Discharge Serial Numbers 101 through 164 inclusive:

101	E. Capitol Drive
102	E. Keefe Avenue
103	E. Edgewood Avenue
104	E. Auer Avenue (36″)
105	E. Auer Avenue (84″)
106	E. Hampshire Street
107	E. Burleigh Street
108	E. Chambers Street
109	E. Locust Street
110	E. Park Place
111	E. Bradford Avenue
112	E. Boylston Street
113	E. Tunnel Place
114	N. Pulaski Street
115	N. Humboldt Avenue
116	Point 350 feet west of N. Humboldt Avenue
117	Point 800 feet west of N. Humboldt Avenue
118	N. Marshall Street
119	N. Holton Street
120	E. Brady Street
121	North of E. Walnut Street (96″)
122	E. Walnut Street
123	E. Pleasant Street
124	North of Cherry Street
125	W. Cherry Street (90″)
126	E. Lyon Street
127	E. Ogden Avenue
128	W. McKinley Avenue

Serial No.	Location
129	W. Juneau Avenue
130	E. Juneau Avenue
131	W. Highland Avenue
132	E. Highland Avenue
133	W. State Street
134	E. State Street
135	W. Kilbourn Avenue (36″)
136	W. Kilbourn Avenue (4′-6″ x 6′)
137	E. Kilbourn Avenue
138	North of W. Wells Street (30″)
139	W. Wells Street (48″)
140	E. Wells Street
141	North of W. Wisconsin Avenue (18″ x 30″)
142	W. Wisconsin Avenue (24″)
143	E. Wisconsin Avenue
144	North of W. Michigan Street (30″)

145	W. Michigan Street (54″)
146	E. Michigan Street
147	North of W. Clybourn Street (24″ x 26″)
148	W. Clybourn Street (48″)
149	E. Clybourn Street
150	North of W. St. Paul Avenue (30″)
151	W. St. Paul Avenue
152	E. St. Paul Avenue
153	E. Buffalo Street
154	E. Chicago Street
155	S. 1st Street
156	S. Water Street
157	E. Pillsburgh Avenue
158	N. Broadway
159	South of E. Oregon Street
160	E. Florida Street

Serial No.	Location
161	E. Polk Street
162	E. Harbor Place
163	E. Bruce Street
164	North of W. Juneau Avenue (36″)

Combined Sewer Overflows to the Kinnickinnic River—Discharge Serial Numbers 165 through 186 inclusive:

165	E. National Avenue
166	E. Walker Street
167	South of E. Walker Street
168	South of E. Washington Street
169	E. Greenfield Avenue
170	S. Kinnickinnic Avenue (30″)
171	S. Kinnickinnic Avenue (60″)
172	S. 1st Street N. (42″)
173	S. 1st Street S. (42″)
174	S. 2nd Street
175	W. Rogers Street
176	W. Becher Street (12′ x 6′)
177	W. Becher Street (96″)
178	W. Lincoln Avenue (30″)
179	W. Lincoln Avenue (48″)
180	S. Chase Avenue (18″)
181	S. Chase Avenue (10′ x 5′)
182	W. Cleveland Avenue (72″)
183	W. Cleveland Avenue (84″)
184	S. 8th Street
185	S. 14th Street
186	S. 27th Street

Combined Sewer Overflows to the Menomonee River—Discharge Serial Numbers 187 through 203 inclusive:

187	S. 2nd Street

Serial No.	Location
188	West of N. 8th Street
189	N. Muskego Avenue (30″)
190	N. Muskego Avenue (54″)
191	N. 15th Street (D61-7′ x 4′)
192	N. 15th Street (7′ x 4′)
193	N. 17th Street
194	N. 25th Street
195	N. 26th Street
196	S. 27th Street (48″)
197	S. 27th Street N. (48″)
198	S. 35th Street
199	W. Wisconsin Avenue (24″E)
200	W. Wisconsin Avenue (24″)
201	N. 43rd Street
202	N. 45th Street
203	N. Hawley Road
203a	W. Congress Street (Ext'd) 85′ E. of N. 35th Street

Combined Sewer Overflows to the South Menomonee Canal-Branch of Menomonee River—Discharge Serial Numbers 204 and 205:

204	S. 4th Street
205	S. 6th Street

Combined Sewer Overflows to Burnham's Canal-Branch of Menomonee River—Discharge Serial Numbers 206 through 211 inclusive:

Serial No.	Location
206	S. 9th Street (36″)
207	S. 9th Street (78″)

208 S. 11th Street
209 S. 13th Street (36″)
210 S. 13th Street (60″)
211 S. Muskego Avenue

Combined Sewer Overflows to Lake Michigan—Discharge Serial Numbers 212 and 213:

212 E. Bay Street
213 E. Russell Avenue

"ATTACHMENT A"

1. Discharge Serial Number:
2. Discharge Location: _____
3. Name of Receiving Water: _____
4. Occurrence (check when discharge occurs)

   Wet weather _____Yes, _____No
   Dry weather _____Yes, _____No

5. Frequency (Give the actual or approximate number of incidents per year)

   Wet weather _____times per year
   Dry weather _____times per year

6. Duration (Give the average duration per incident in hours)

   Wet weather _____hours
   Dry weather _____hours

7. Volume (Give the average volume per incident in thousand gallons)

   Wet weather _____thousand gallons per incident
   Dry weather _____thousand gallons per incident

8. Reason (Give brief reason or justification for discharge)

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES
Box 450—Madison, Wisconsin 53701
L. P. Voight, Secretary

In Reply Refer to: 3420

Certified Mail
Return Receipt Requested

Mr. Herbert A. Goetsch
Commissioner of Public Works
City of Milwaukee
841 North Broadway—Room 516
Milwaukee, Wisconsin 53202

RE: Modification of WPDES Permit No. WI-0026875

Dear Mr. Goetsch:

The request for modification of Wisconsin Pollutant Discharge Elimination System (WPDES) Permit No. WI-0026875 initiated by Mr. Edwin Laszewski on March 17, 1975 has been processed in accordance with Section 147.03, Wisconsin Statutes.

The page which is attached, namely, page 7a of 7 of Part II is an addition to the original permit issued on December 18, 1974. Please replace the original page with this attached modified page in all copies of the permit which you retain in your records. All discharges from this facility and actions or reports relating thereto shall be in accordance with the terms and conditions of the original permit, as modified.

The WPDES permit program has been approved by the Administrator of the U.S. Environmental Protection Agency pursuant to Section 402(b) of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. Section 1342(b)). The modified permit is accordingly subject to

enforcement under Section 147.21 and 147.29, Wisconsin Statutes and Section 309 of the Federal Act (33 U.S.C. Section 1319).

/s/ ANDREW C. DAMON
Andrew C. Damon
Acting Administrator
Division of Enforcement

Dated July 30, 1975

Enclosures
Permit
Reporting Forms

cc: U.S. Environmental Protection Agency
ATTN: Permits Branch
Southeast District

APPENDIX I

The following sanitary sewer crossovers will be eliminated from the permit:

Serial No.	Location
005	North 31st Street and West Villard Avenue
007	North 47th Street and West Concordia Avenue
008	North 47th Street and West Congress Street
009	North 49th Street and West Concordia Avenue
012	South 3rd Street and West Saveland Avenue

The following combined sewer crossover will be eliminated from the permit:

Serial No.	Location
100	N. 37th St. 11 feet north of W. Mt. Vernon

The following combined sewer overflows will be eliminated from the permit:

Serial No.	Location
135	West Kilbourn Avenue (36")
164	North of West Juneau Avenue (36")
188	West of N. 8th Street
162	East Harbor Place

The following sanitary sewer crossovers will be added to the permit:

Serial No.	Location
089a	West Olive Street 435 St. SE of W. Roosevelt Drive
089b	North 24th Street and West Hope Avenue

The following combined sewer overflow shall be added to the permit:

Serial No.	Location
203a	W. Congress St. (extended) 85 ft. east of North 35th St.

APPENDIX II

The following combined sewer overflows are eliminated from the permit.

Serial Number	Location
116	Point 350 feet west of N. Humboldt Avenue
117	Point 800 feet west of N. Humboldt Avenue

The following combined sewer overflows are eliminated from the permit.

Serial Number	Location
104	E. Aver Avenue (36″)
144	North of W. Michigan Street (30″)

The following sanitary sewer crossover is added to the permit.

Serial Number	Location
089c	N. 89th Street and W. Center Street (southerlyh [sic])

The following combined sewer overflow is added to the permit.

Serial Number	Location
203b	N. 9th Street (extended—96″)

Defendants' Exhibit 1311

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 72-C-1253

PEOPLE OF THE STATE OF ILLINOIS, ex rel. WILLIAM J. SCOTT, Attorney General of the State of Illinois, *Plaintiff*,
PEOPLE OF THE STATE OF MICHIGAN,

vs.

CITY OF MILWAUKEE, WISCONSIN; CITY OF KENOSHA, WISCONSIN; CITY OF RACINE, WISCONSIN; CITY OF SOUTH MILWAUKEE, WISCONSIN; THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Defendants.

MOTION TO DISMISS

The Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee, defendants herein, by their attorneys, Schroeder, Gedlen, Riester & Moerke, by Ewald L. Moerke, Jr., and the City of Milwaukee by James B. Brennan, City Attorney, represented by Michael J. McCabe, Assistant City Attorney, hereby moves the Court to dismiss the above-captioned action now on trial for the reasons set forth in the accompanying Affidavit.

SCHROEDER, GEDLEN, RIESTER & MOERKE
By: /s/ EWALD L. MOERKE, JR.
Ewald L. Moerke, Jr.
Attorneys for Defendants,
Sewerage Commission of the City of Milwaukee and Metropolitan Sewerage Commission of the County of Milwaukee

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 72-C-1253

PEOPLE OF THE STATE OF ILLINOIS, ex rel, WILLIAM J. SCOTT, Attorney General of the State of Illinois, *Plaintiff*,
PEOPLE OF THE STATE OF MICHIGAN,

VS.

CITY OF MILWAUKEE, WISCONSIN; CITY OF KENOSHA, WISCONSIN; CITY OF RACINE, WISCONSIN; CITY OF SOUTH MILWAUKEE, WISCONSIN; THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Defendants.

AFFIDAVIT

STATE OF WISCONSIN,)
MILWAUKEE COUNTY,) ss

Ewald L. Moerke, Jr., being first duly sworn on oath, deposes and states as follows:

1. That he is the attorney for the Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee, defendants herein.

2. That the above-captioned action is an action commenced by the plaintiffs grounded on the Federal Common Law of Nuisance as described and set forth in *Illinois* v. *City of Milwaukee* (1972) 406 U.S. 91.

3. On January 1, 1975 the Department of Natural Resources of the State of Wisconsin issued discharge permits to the Sewerage Commission of the City of Milwaukee for the operation of the Jones Island Waste Water Treatment Plant and the South Shore Waste Water Treatment Plant containing effluent limitations and other terms and conditions and restrictions on the operation of said plants.

4. On or about the middle of July, 1976, the Sewerage Commission of the City of Milwaukee commenced an action in the Circuit Court of Dane County, Wisconsin challenging the permits issued by the Department of Natural Resources. Shortly thereafter, the Department of Natural Resources, through the Attorney General of the State of Wisconsin, counter-claimed in said action alleging the validity of the permits and seeking a money judgment from the Sewerage Commission of the City of Milwaukee for forfeitures for violations of the terms and conditions of said permits.

5. Negotiations have taken place between the Commissions on one hand and the Department of Natural Resources and the Attorney General's office on the other hand with respect to the settlement of such litigation, and on May 25, 1977 a Stipulation and Agreement was finally signed and approved by the Honorable William C. Sachtjen, one of the judges of the Circuit Court of Dane County and at such proceedings the Metropolitan Sewerage Commission of the County of Milwaukee was made a party plaintiff to said action. At the same time, Judgment was entered by the Court approving the Stipulation between the parties as fair and reasonable and incorporating the Stipulation by reference in said Judgment and adopting the terms thereof as the Judgment of the Court.

6. Among other things, the Stipulation and Judgment reserves to the Court the issue of the validity of the existing permits for a future trial and determination and further provides that if such permits are valid, then the question of the amount of forfeiture, if any, will be tried to the Court.

7. The document also provides for a complete schedule of compliance, including time limitations within which certain actions are to take place and requiring the defendants to raise substantial sums of money to carry out such sched-

ule of compliance, the total of which is estimated to be approximately $700 million in terms of 1976 dollars and is estimated to exceed $1 billion at the time of completion.

8. The Stipulation and Judgment further provides that the two Commissions, defendants herein, have the obligation of supervising the correction of wet weather bypassing and overflowing at the separate sewer areas of the district and the contract areas and calls for the correction of all such situations not later than July 1, 1986, and authorizes the Commissions to bring suit against those participating municipalities for failure to comply with that requirement.

9. The Stipulation and Judgment also provides for the correction of wet weather bypassing and overflowing in the City of Milwaukee and the Village of Shorewood, consisting of approximately 27 square miles served by said storm and sanitary sewers and obligating the district to implement such program in accordance therewith.

10. Pending the improvements to the sewerage treatment plants called for in said Agreement, the Stipulation and Judgment imposes waste load restrictions and apportionment by requiring a limitation on the amount of new sewers and connections to the system which takes into consideration the improvements to be made to such plants under the schedule of compliance.

11. The Stipulation and Agreement provides for continuous supervision of the schedule of compliance by the Dane County Circuit Court by requiring the Department of Natural Resources to submit to the Court a compliance evaluation report, thus requiring continuing jurisdiction of that Court insuring compliance with the terms and conditions of the Stipulation and Judgment.

12. The Stipulation and Judgment also contains a requirement that the Department of Natural Resources reissue the present permits for the operation of the South Shore and Jones Island Waste Water Treatment facilities containing the same effluent limitations as in the current permits which permits, pursuant to law, will be for five years unless modified pursuant to the administrative rules and regulations in effect at the time of such modification. Any violations of the terms and conditions of such permits as reissued will be reviewed by the parties and by the Court once a year.

13. The Stipulation and Judgment, the continuing jurisdiction of the Dane County Circuit Court, the detailed and comprehensive schedule of compliance, the time limitations agreed to by the parties therein and the enforcement of such agreement by the imposition of forfeitures pursuant to law constitute a complete and comprehensive exhaustion and implementation of applicable provisions of Public Law 92-500 and Chapter 144 and 147 of the Wisconsin Statutes and constitute a complete program for the protection of the health of all citizens using Lake Michigan as a source of potable drinking water and for recreational purposes and is an assumption by the federal and state regulatory agencies of the protection of the Great Lakes thus making use of the doctrine of Federal Common Law of Nuisance unnecessary in that the plaintiff's rights are adequately and fully protected by the full and complete assumption of such jurisdiction.

14. Attached hereto are conformed copies of the Stipulation and an Order making the Metropolitan Sewerage Commission of the County of Milwaukee an additional plaintiff to this action and the Judgment.

15. This Affidavit is for the purpose of supporting the Motion to Dismiss to which it is attached.

/s/ Ewald L. Moerke, Jr.
Ewald L. Moerke, Jr.

Subscribed and sworn to before me this 26th day of May, 1977.

/s/ Susan K. Long
Notary Public, State of Wisconsin
My Commission expires 12-14-80.

STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY

Case No. 152-342

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE,
Plaintiff,

METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, *Additional Plaintiff,*

v.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
Defendant.

STIPULATION

WHEREAS, the Sewerage Commission of the City of Milwaukee ("the City Commission") is charged by law with the duty of projecting planning, constructing and establishing a sewerage system for the collection, transmission and disposal of the sanitary and industrial sewage generated within the City of Milwaukee and to this end has established and maintained a system of intercepting sewers within the City and has constructed, and presently operates the Jones Island and South Shore sewage treatment plants; and,

WHEREAS, the State of Wisconsin Department of Natural Resources ("the Department") has issued to the City Commission Wisconsin Pollutant Discharge Elimination System ("WPDES") permits nos. WI-0024767 for the Jones Island treatment plant ("the Jones Island permit") and WI-0024775 for the South Shore treatment plant ("the South Shore permit"), which permits require, *inter alia,* that by December 27, 1974, the Jones Island treatment plant meet secondary and applicable water quality treatment standards and by January 1, 1975, that the South Shore treatment plant meet the same standards; and,

WHEREAS, the City Commission on July 7, 1976, sought judgment declaring that that portion of sec. NR 210.10, Wis. Admin. Code, which authorizes the Department to require secondary treatment standards to be met by publicly owned treatment works before July 1, 1977 is in excess of the Department's statutory rule-making authority and is in excess of its jurisdiction; and,

WHEREAS, in its complaint for declaratory judgment, the City Commission further sought judgment declaring that those portions of the Jones Island and South Shore permits are void *ab initio* insofar as they require secondary treatment prior to July 1, 1977; and,

WHEREAS, the Department in its answer and counterclaim in this action alleged that the federal government, by the Federal Water Pollution Control Act Amendments of 1972 ("FWPCA") is authorized to require publicly owned treatment works to meet secondary treatment standards on or before July 1, 1977, and further alleged that the Department is authorized by sec. 147.04(3)(a), Wis. Stats., and sec. NR 210.10, Wis. Admin. Code, to require publicly owned treatment works to achieve secondary treatment standards on or before July 1, 1977; and,

WHEREAS, the Department in its counterclaim of August 2, 1976, alleged that since January 1, 1975, the City Commission has violated the effluent limitations in its Jones Island and South Shore permits a total of more than sixty times; and that at the Jones Island plant these consisted of violations of effluent limitations on suspended solids, BOD_5 (5-day biochemical oxygen demand), fecal coliform and total phosphorus; and that the violations at the South Shore plant consisted of exceeding effluent limitations on suspended solids, BOD_5 and total phosphorus, and,

WHEREAS, the Metropolitan Sewerage Commission of the County of Milwaukee, ("the County Commission") is charged by law with the duty of projecting, planning, constructing and establishing a sewerage system for the collection, and transportation of sanitary and industrial sew-

age from areas outside of the City of Milwaukee but within the service area of the Metropolitan Sewerage District of the County of Milwaukee ("the District") for disposal at the Jones Island and South Shore sewage treatment plants, all subject to approval by the City Commission; and

WHEREAS, the Department alleges that such sewage generated within the service area of the City and County Commissions contribute to the overloading of the Jones Island and South Shore plants and exacerbates the inadequate waste water treatment being provided by these plants; and

WHEREAS, the Department alleges that under dry weather and wet weather conditions, bypassing and overflowing occur within the sewerage systems of the Commissions and such discharges must either be eliminated or meet secondary treatment standards by July 1, 1977; and,

WHEREAS, it is alleged by the Department that violations of treatment standards at Jones Island and South Shore, and bypass or overflow discharges within the sewerage systems will continue to occur until such time as sewerage system improvement projects are completed; and

WHEREAS, the Department demanded judgment for, among other things, a mandatory injunction requiring the Commission to take steps to bring it into compliance with the terms of its Jones Island and South Shore permits; and,

WHEREAS, the Metropolitan Sewerage District of the County of Milwaukee is a body corporate acting through the agency of the City and County Commissions and under law holds title to all property obtained by either or both Commissions; and,

WHEREAS, the parties now desire to settle the above entitled action by agreeing to a program of pollution abatement projects to be carried out in the District.

NOW, THEREFORE, THE PARTIES BY THEIR RESPECTIVE ATTORNEYS, HEREBY STIPULATE AND AGREE AS FOLLOWS:

A. Compliance Schedule and Timetable

1. Federal Funding Priorities and Timetable.

(a) The parties recognize and agree that they cannot bind the federal government nor obligate state or federal funds in advance. It is further understood that the program of funding for sewage treatment plant and sewerage system improvements set forth in this Stipulation anticipates the continued availability of federal financial assistance in the amount of seventy-five percent (75%) of eligible costs and twelve-and-one-half percent (12½%) state funding of eligible project costs for the combined sewer overflow project.

(b) Consistent with the applicable state rules and federal regulations and guidelines the Commissions shall, beginning in calendar year 1977, cause to be raised sufficient local funds to enable them to obligate available federal and state funds for necessary sewerage system improvement projects in accordance with the following minimum annual expenditure schedule:

YEAR	MINIMUM ANNUAL EXPENDITURE (1976 DOLLARS)
1977	$35.2 million
1978	40.1
1979	31.2
1980	52.5
1981	60.4
1982	51.6
1983	45.6
1984	40.2
1985	40.2
1986-1992	33.2 per year
1993	22.5

(c) The District shall plan, obligate funds and schedule improvements to accomplish the following requirements:

(1) Completion and placement in operation of the Solids Management Program at the Jones Island and South Shore plants shall be accomplished by no later than July 1, 1982;

(2) The Relief Sewers projects shall be completed by no later than July 1, 1983;

(3) The Waste Water Treatment Plant Facility Improvements projects shall be completed by no later than July 1, 1982;

(4) Consistent compliance with secondary treatment standards and the current phosphorous limitation contained in the permits of 1 mg/liter on a monthly average at both the Jones Island and South Shore treatment plants not later than July 1, 1982;

(5) Elimination of any bypassing or overflowing which occurs within the sewerage systems under dry weather by not later than July 1, 1982;

(6) The Sewer and Plant Rehabilitation projects, other than the main and intercepting sewer system rehabilitation and combined sewer overflow projects, shall be completed by no later than July 1, 1983;

(7) The New Trunk Sewers to serve District projects shall be completed by no later than July 1, 1982; and,

(8) The New Trunk Sewers to serve Contract Areas projects shall be completed by no later than July 1, 1982.

2. Local Funding Priorities and Timetable.

(a) In the event that in any calendar year, anticipated state or federal financial assistance is not available, or is available in a percentage lower than that set forth in para-

graph A 1.(a), the Commissions shall, nevertheless, raise and obligate local monies for necessary sewage treatment plant and sewerage system improvement projects in accordance with the following:

(1) The amount of local dollars to be raised and obligated by the Commissions in any one calendar year for capital improvements shall be not less than 15 million dollars (1976 dollars) in local funds;

(2) The precise amount to be raised and obligated for capital improvements in a given calendar year shall be sufficient to assure that the following requirements will be met:

(a) Completion of the solids management program projects at both South Shore and Jones Island, by not later than July 1, 1982;

(b) Completion of those wastewater treatment plant facility improvement projects necessary to achieve and maintain consistent compliance with the terms of sections (d) and (e) below by not later than July 1, 1982;

(c) Completion of the relief sewer projects by not later than July 1, 1983;

(d) Consistent compliance with secondary treatment standards and the current phosphorous limitation contained in the permits of 1 mg/liter on a monthly average at both the Jones Island and South Shore treatment plants by not later than July 1, 1982; and

(e) Elimination of any bypassing or overflowing which occurs within the sewerage systems under dry weather conditions by not later than July 1, 1982.

(3) This obligation shall commence in 1977 and shall terminate upon completion of, or compliance with, (a) through (e) above.

3. For purposes of this Stipulation, the term "1976 dollars" means the purchasing power of a dollar in the year 1976. The conversion shall be made for each year, to determine the number of dollars which must be raised to be equivalent to any 1976 dollar figure set out in this Stipulation, by utilizing Consumer Price Index data (column entitled "All Items") supplied by the U.S. Department of Labor, Bureau of Labor Statistics, for the Milwaukee Standard Metropolitan Statistical Area (SMSA) which includes Milwaukee, Ozaukee, Washington, and Waukesha Counties, in the following manner:

(a) The base year consumer price index (1976) shall be determined as the annual average of the four quarterly 1976 index figures;

(b) The annual average consumer price index derived above shall be converted to a base of 100;

(c) The percentage increase in the consumer price index ("All Items" column) for Milwaukee between 1976 and the pertinent year average annual consumer price index shall be multiplied times the dollar figure contained in the Stipulation.

4. Critical Path Analysis.

(a) By no later than June 1, 1977, the Commissions shall submit to the Department for its approval a complete and adequate critical path analysis ("CPA") of the various sewage treatment plant and sewerage system improvement projects necessary to meet applicable treatment standards. The CPA shall describe each project or project segment. It shall also identify the minimum time frames necessary for the planning, design, and construction of each project

or project segment, as well as identify a completion date for each project or project segment.

(b) The CPA shall not be deemed complete nor adequate until approved by the Department in writing. In the event of a dispute on the content of the CPA the decision of the Department shall be final and remain in effect unless and until stayed, modified or remanded by the Court on the ground that the Department's decision is unreasonable.

(c) At a minimum the CPA shall assure that the waste water treatment plant and sewerage system improvements are completed in compliance with the following time schedules and priorities:

(1) Completion and placement in operation of the Solids Management Program at Jones Island and South Shore shall be accomplished by no later than July 1, 1982;

(2) The Relief Sewers projects shall be completed by no later than July 1, 1983;

(3) The Waste Water Treatment Plant Facility Improvements projects shall be completed by no later than July 1, 1982;

(4) The Sewer and Plant Rehabilitation projects, other than the main and intercepting sewer system rehabilitation and combined sewer overflow projects, shall be completed by no later than July 1, 1983;

(5) The New Trunk Sewers to serve District projects shall be completed by no later than July 1, 1982; and,

(6) The New Trunk Sewers to serve Contract Areas projects shall be completed by no later than July 1, 1982.

5. Annual Schedule Establishment.

Beginning in 1977, by the end of October of each year, the Commissions shall establish the progress to be made, the

compliance schedule to be met, and the dollar appropriations to be obligated for each project in the following calendar year. This annual schedule establishment ("ASE") shall not become effective until approved by the Department. It shall take into consideration the time frames set forth in the CPA, and the amount, if any, of federal or state financial assistance which is expected to be available for each project in that year. In determining the manner in which federal, state, and local monies will be obligated for the year, the Commissions shall give priority in accordance with the following:

Priority 1: Completion of the solids management program at both South Shore and Jones Island treatment plants by no later than July 1, 1982;

Priority 2: Completion of relief sewers by no later than July 1, 1983;

Priority 3: Completion of waste water treatment plant facility improvements by no later than July 1, 1982;

Priority 4: Completion of sewer and plant rehabilitation, including collection sewer system rehabilitation;

Priority 5: Completion of combined sewer overflow abatement project;

Priority 6: Completion of new trunk sewers to serve District, and

Priority 7: Completion of new trunk sewers to serve contract areas.

B. Correction of Wet Weather Bypassing and Overflowing in the Separate Sewer Areas of the District and Contract Areas.

1. It is recognized by the parties that correction of wet weather bypassing and overflowing in the separate sewer areas of the District and contract areas is best addressed by a district-wide effort coordinated by the Commissions.

2. The Commissions shall coordinate the District-wide Sewer System Evaluation in the separated sewer areas of the participating municipalities, consisting of the System-wide Infiltration/Inflow Analysis and the Sewer System Evaluation Survey. As a result of those studies, the Commissions shall submit to the Department a program for correction of wet weather bypassing and overflowing for each participating municipality, including a designation of correction work to be done and a determination of the length of time required to complete that work.

3. The Sewer System Evaluation Survey Report for each participating municipality shall be reviewed and evaluated by the Department, and shall not be deemed acceptable until the Commissions are so notified in writing by the Department.

4. The Sewer System Evaluation Survey Report for each participating municipality shall be submitted to the Department by not later than July 1, 1980; at a minimum, it shall identify a time schedule which assures that all designated corrective work in each participating municipality is completed by not later than July 1, 1986.

5. The Commissions shall establish appropriate time schedules and monitor progress to ensure that completion of wet weather work in each participating municipality shall be accomplished by the individual participating municipality by not later than July 1, 1986. Such schedules are subject to approval by the Department. In the event of a dispute between the Department and the Commissions over the schedule, the Commissions shall be governed by the Department's schedule and enforce it according to this section. Such determination shall be final and remain in effect unless and until stayed, modified or remanded by the Court on the ground that the Department's decision is unreasonable. The Commissions shall deny without exception any request for extension of sanitary sewers or additional waste loading from any participating municipality not meeting the schedules established hereunder.

6. Nothing in this section shall prevent the Commissions from entering into contracts with participating municipalities providing for completion of the designated corrective work by the Commissions by not later than July 1, 1986.

7. The Commissions shall take all possible steps to assure that each participating municipality completes the correction of wet weather bypassing and overflowing within its separate sewer areas by not later than July 1, 1986, regardless of the availability of state or federal financial assistance for those projects. The decision to bring suit in the name of the Commissions against a given municipality for failure to comply with this requirement rests with the Commissions. The Commissions' decision will in no way be deemed to bar the Department or the State of Wisconsin from bringing suit against a given municipality for violation of this requirement.

C. Correction of Wet Weather Bypassing and Overflowing in the Combined Sewer Areas of the City of Milwaukee and the Village of Shorewood.

1. It is recognized by the parties that the District contain approximately 27 square miles served by combined storm and sanitary sewers located in and owned by the City of Milwaukee and the Village of Shorewood, which bypass and overflow during and immediately after periods of wet weather. It is further recognized that correction of the combined sewer overflow ("CSO") problem is best addressed by a district-wide effort implemented by the Commissions.

2. As part of the obligation set forth in section A.1., the Commissions shall raise and obligate sufficient local funds to enable them to obligate available federal and state funds to assure accomplishment of the CSO abatement project on the following schedule:

(a) Completion of design work by July 1, 1981;

(b) Completion of construction and achievement of applicable water quality standards by July 1, 1993; and

(c) Beginning in 1978, by July 1 of every year the Commissions shall submit to the Department a progress report on the combined sewer overflow abatement project detailing the current status of the project and the Commissions' best estimate of the work that will be completed in the subsequent year.

3. In the event that in any calendar year state and/or federal financial assistance is not available as set forth in section A.1.(a), the Commissions shall cause to be raised and obligated local funds in the following amounts annually toward the combined sewer overflow abatement projects provided, however, that projects included in priority category 3 and 4 under section A.5., above, may be undertaken if approved by the Department:

(a) For the period from January 1, 1983 thru December 31, 1996, not less than 13 million dollars annually in 1976 dollars;

(b) For the period from January 1, 1997 thru the completion of the combined sewer overflow abatement project, not less than the 1996 dollar equivalent of 13 million 1976 dollars annually.

D. Waste Load Restrictions and Apportionment

1. The Commissions shall establish necessary rules and regulations pursuant to their authority to restrict the amount of BOD_5, total suspended solids, and flow which are added to the sewerage system of the Commissions each year as a result of sanitary sewer extensions, industrial and commercial connections and contributions to new and existing sanitary sewers, and any new loadings via laterals in excess of 1,000 gallons per day of flow. Such additional

waste loadings per year shall be restricted according to the following schedule:

Year	Flow (mgd)	BOD_5 (Lbs. Per Day)	Total Suspended Solids (Lbs. Per Day)
1977	2.1	10,000	10,000
1978	2.1	10,000	10,000
1979	2.1	6,000	6,000
1980	2.1	5,000	5,000
1981	2.1	4,000	4,000
1982	2.1	3,000	3,000

2. Thereafter, in the event that violations of secondary treatment standards or the 1 mg/liter monthly average phosphorous limitation in the current permits have occurred at either the Jones Island or South Shore treatment plants in the previous year, or in the event that dry weather bypassing occurred in the sewerage systems in the previous year, additional loadings to the sewerage systems of the Commissions shall be restricted as follows:

Year	Flow (mgd)	BOD_5 (Lbs. Per Day)	Total Suspended Solids (Lbs. Per Day)
1983	1.0	2,000	2,000
1984	1.0	1,000	1,000
1985	1.0	1,000	1,000
1986 & Beyond	0	0	0

3. Said rules and regulations shall establish a mechanism for apportionment of the total additional load among the municipal customers of the District, including those within the District and the contract areas.

4. Said rules and regulations shall provide that the Commissions shall review and evaluate all requests for exten-

sion of sanitary sewers which would be tributary to the District sewerage system, and all requests for new or additional commercial and industrial connections and contributions for compliance with the rules and regulations. The Commissions shall then transmit each request which they deem approvable, along with the Commissions' evaluation, to the Department for its statutory review and approval or denial. The Commissions' primary responsibility for such review may, by rule, be delegated to the appropriate municipality.

5. By January 20 of each year, the Department shall notify the Commissions in writing as to whether the provisions of this waste load restriction schedule shall be in effect for that year. The Department's determination in this regard shall be accepted by the Commissions without dispute. If certification is given that treatment standards were met and that no dry weather bypassing occurred in the previous year, the Commissions shall restrict additional loadings in any subsequent year as necessary to assure continued compliance with this agreement and local ordinances and state and federal laws or regulations.

6. The rules and regulations adopted pursuant to paragraph D.1. shall require each municipal customer of the District, including those within the District and the contract areas, to agree to an acceptable program, time schedule, and financial commitment for correction of its wet weather overflow(s) or bypass(es) occurring from separate sanitary sewers. Such rules and regulations shall require that no municipality shall be eligible to utilize any portion of its additional waste load apportionment unless it has agreed to an acceptable program, time schedule, and financial commitment, and is meeting the deadlines established therein.

7. Said rules and regulations may, at the discretion of the Commissions, provide that in the event that the additional waste loading authorized by this section for a given

calendar year is not fully utilized in that year, up to 40% of that unused additional waste load may be carried over into the next year; provided, however, that such portion carried over must be used within six months. If it is not utilized within that time period, said portion shall lapse. Such rules and regulations may also provide that up to 40% of the additional waste loadings authorized by this section for a given calendar year may be utilized in the preceding year. Waste loadings utilized prospectively shall then be deducted from the next year's allocations so that the total additional loadings do not exceed the maximum for that year.

8. There shall be no exceptions granted to the additional waste loadings authorized hereunder; provided, however, that said rules and regulations may, at the discretion of the Commissions, establish that sewer extensions approved by the Department of Natural Resources pursuant to sec. NR 110.05(5)(a), (b), (c), or (d) (effective date, October 1, 1976), shall not be considered in the calculation of the amount of the additional waste loadings utilized in that calendar year.

9. Rules shall be adopted within six months from the date of this Stipulation. The Commissions shall submit proposed rules to the Department at least thirty (30) days prior to adoption. In the event that the Department determines that said rules are inconsistent with federal or state law, Department administrative code rules, or the terms of this Stipulation, the Department may petition the Court for a ruling on that determination. The effect of the Department's petition shall be to stay the operation of the rules. That stay shall remain in effect until such time as there is a judicial decision that said rules, as proposed, modified, or amended, are consistent with federal and state law, Department administrative code rules, and the terms of this Stipulation. No additional waste load authorized by section D. of the Stipulation may be utilized except by operation of such rules.

E. Compliance Audit Report

1. Beginning on July 1, 1977, and every six months thereafter the Commissions shall submit to the Department a Compliance Audit Report ("CAR") providing the following information:

(a) A compilation of the preceding six months data of the effluent discharged from the Jones Island and South Shore treatment plants, setting forth violations as they occurred;

(b) A status report on the progress of each treatment plant and sewerage system improvement project, including an evaluation of future compliance with the time schedule applicable to each project;

(c) A financing statement which includes:

(1) A review of the local monies raised and obligated, the state and federal monies obligated, and the projects to which they were obligated in the preceding six months, and

(2) A projection of the local, state, and federal monies to be obligated, and the projects to which they will be obligated, in the succeeding six months;

(d) A report of the actions taken pursuant to the rules and regulations governing the Waste Load Apportionment.

2. The Department shall review the Compliance Audit Report to determine compliance with the terms and conditions of this Stipulation. Within ninety (90) days of the date of receipt of the CAR by the Department, the Department shall submit to the Court a Compliance Evaluation Report ("CER") certifying alleged violations.

F. Additional Provisions

1. The parties hereto recognize that it is in the public interest that their differences be expeditiously resolved. Nothing herein shall be deemed an admission for any purpose on the part of the Department, either Commission, or their respective officers, agents, or employes as to any of the matters material hereto.

2. This Stipulation shall not affect legal remedies available to any of the parties under law as to matters beyond the scope of this agreement.

3. It is understood that the Jones Island and South Shore treatment plant permits referred to herein will both expire on June 30, 1977. The Commissions agree that the Department shall, pursuant to ch. 147, Wis. Stats., propose, public notice, and reissue the present WPDES permits containing the current effluent limitations to the Commissions which shall require that all discharges from the sewerage systems and treatment plants owned and operated, either individually or collectively, by the Commissions be eliminated by July 1, 1977 or meet secondary and applicable water quality related treatment standards by that date. Accordingly, the Commissions agree to accept those permits as reissued. This paragraph does not preclude the Commissions from challenging general or special conditions other than the effluent limitations and their effective date.

4. Forfeitures and Monitoring Fees.

(a) The parties agree to try to the Court the question of forfeitures, if any, for alleged violations of WPDES permits no. WI-0024767 and no. WI-0024775, and their successor permits, occurring between the date of issuance of such permits and the date of this Stipulation. Such trial shall be held in July, 1977, or as soon thereafter as court time can be scheduled.

(b) The parties further agree to try to the Court the question of forfeitures for any alleged violations of WPDES permits no. WI-0024767 and no. WI-0024775, and their successor permits, or any alleged non-compliance with any date scheduled in the annual schedule establishment ("ASE") established pursuant to the provisions of section A.5. above in July of each succeeding year during the term of this Stipulation. Provided further, however, that such trial to the Court shall only occur if, after review by the parties, the question of forfeitures, if any, remains in controversy between the parties to this Stipulation.

(c) For the period from the effective date of this Stipulation to July 1, 1982, the Department of Justice agrees that in regards to alleged violations of WPDES permit effluent limitations, it will seek forfeitures for only violations of the monthly average effluent limitations, so long as the Commissions maintain consistent compliance with the terms of this Stipulation.

5. Each municipality within the District or contract areas may become a "participating municipality" within the terms of section B of this Stipulation by adoption of a resolution of commitment to the correction of wet weather related bypassing and overflowing within its sewerage system. Such resolution shall provide that the municipality will participate in the District-wide Sewer System Evaluation, and will implement the designated corrective program established as a result of those studies. The resolution shall further provide that in the event that sufficient federal or state funds are unavailable through the Commissions to finance the designated corrective program, the individual municipality itself will provide the necessary financing to assure completion of its wet weather correction program by the date established in the Sewer System Evaluation or by July 1, 1986, whichever occurs sooner. Upon receipt of each participating municipality's resolution, the Department shall review and evaluate that reso-

lution for satisfaction of the terms of this Stipulation. If the resolution is deemed acceptable by the Department, it shall so notify the municipality and the Commissions. Thereafter, requests for sanitary sewer extensions within that municipality may be approved by the Department pursuant to sec. NR 110.05, Wis. Admin. Code, or its successor section, subject to the rules and regulations of the Commissions concerning additional waste loading apportionment.

6. In the event that the Department of Natural Resources receives a commitment to a program for correction of wet weather related bypassing and overflowing within its sewerage system from a municipality not participating in the District-wide Sewerage System Evaluation, the Department shall make a determination as to its acceptability under the terms of sec. NR 110.05, Wis. Admin. Code, or its successor section. Upon final agency action as to the acceptability of such program and commitment, the Department of Natural Resources shall notify the Commissions in writing.

7. In the event that there is a violation of the terms of section D., Waste Load Restrictions and Apportionment, all requests for extensions of sanitary sewers tributary to the District sewerage system submitted subsequent to the violation may be denied by the Department.

8. In the event that the Commissions or their agent(s) are unable to comply with any event date in the ASE established pursuant to the provisions of section A.5. because of the happening of an event or events beyond their control, the Commissions may request the Department to amend that project schedule to extend the date by which they are to comply. In the event of a dispute the decision of the Department shall be final and remain in effect unless and until stayed, modified or remanded by the Court on the ground that the Department's decision is unreasonable.

9. The parties agree that the issues raised by the declaratory judgment action of the plaintiff City Commission shall be decided by the Court prior to the trial under section F.4.(a), above. If these issues are decided by the Court in the plaintiff's favor, such determination will not affect the terms or enforceability of this Stipulation nor the Judgment entered pursuant thereto with the sole exception that no forfeiture or other penalty may be assessed against the plaintiff for the period prior to June 30, 1977.

10. Violations of the Judgment entered pursuant to this Stipulation shall be subject to the provisions of sec. 295.01, Wis. Stats.

11. The Judgment entered pursuant to this Stipulation shall remain in full force and effect until all the terms and conditions of the Judgment have been fulfilled, or until otherwise modified by the Court.

12. This Stipulation and the Judgment entered pursuant thereto shall not affect other remedies available to the parties which are not the subject of the Stipulation or Judgment. The parties specifically recognize that during the period covered by the Judgment entered pursuant to this Stipulation, state and/or federal standards affecting water quality may be revised to provide tor stricter water quality related standards. Nothing in this Stipulation or the Judgment entered pursuant thereto absolves the Commissions from complying with such standards or the Department from enforcing them. However, the establishment and enforcement of any more stringent water quality standards than provided for in this agreement shall be through the rules and procedures then in effect under Department of Natural Resources' rule or state statute.

13. The Department will interpret and enforce this agreement consistent with sec. 147.021, Wis. Stats., or any successor section.

14. Any expenditure of local funds required to satisfy any condition of a court order or judgment entered against the City of Milwaukee, Sewerage Commission of the City of Milwaukee, or the Metropolitan Sewerage Commission of the County of Milwaukee, in the case of *People of the State of Illinois ex rel. William J. Scott* v. *City of Milwaukee, et al.*, case no. 72-C-1253, or expenditure of local funds required by any stipulation agreed to in said case, shall be considered local monies for the purpose of complying with the requirement of sections A.(2)(a) and C.(3) of this Stipulation insofar as such expenditure is consistent with the terms of this Stipulation.

Dated this 30th day of March, 1977, in Milwaukee, Wisconsin.

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE

By /s/ DONALD LAPREST
Donald A. LaPrest, Chairman

Attest: /s/ ROBERT A. BORCHARDT
Robert A. Borchardt, Secretary

Dated this 30th day of March, 1977, in Milwaukee, Wisconsin.

THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE

By /s/ NORBERT A. FRIDL
Norbert A. Fridl, Chairman

Attest: /s/ ROBERT A. BORCHARDT,
Robert A. Borchardt, Secretary

Dated this 22nd day of April, 1977, in Madison, Wisconsin.

THE STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES

By /s/ ANTHONY S. EARL
Anthony S. Earl, Secretary

(Seal)

Dated this 25th day of May, 1977, in Madison, Wisconsin.

THE STATE OF WISCONSIN DEPARTMENT OF JUSTICE

By /s/ BRONSON C. LA FOLLETTE
Bronson C. La Follette, Attorney General

APPROVED this ——— day of ————, 1977.

STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY

Case No. 152-342

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE,
Plaintiff,

v.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
Defendant.

ORDER

Upon the foregoing Stipulation between the Sewerage Commission of the City of Milwaukee, the Metropolitan Sewerage Commission of the County of Milwaukee, and the State of Wisconsin Department of Natural Resources, and upon all the files, records and proceedings had herein;

IT IS HEREBY ORDERED that the Metropolitan Sewerage Commission of the County of Milwaukee be admitted as and is hereby made a plaintiff to this action.

Dated this 25th day of May, 1977.

BY THE COURT:
/s/ WILLIAM C. SACHTJEN
Circuit Judge

STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY

Case No. 152-342

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE,
Plaintiff,

METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, *Additional Plaintiff,*

v.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
Defendant.

JUDGMENT

Upon reading and filing the annexed Stipulation between the Sewerage Commission of the City of Milwaukee, plaintiff; the Metropolitan Sewerage Commission of the County of Milwaukee, plaintiff; and the State of Wisconsin Department of Natural Resources, defendant, by their respective officers and by Bronson C. La Follette, Attorney General, and being fully advised in the premises:

IT IS HEREBY ADJUDGED, ORDERED AND DECREED:

1. That plaintiff, Sewerage Commission of the City of Milwaukee, is a municipal body corporate, with its office at Sewage Disposal Plant, Jones Island, Post Office Box 2079, in the City of Milwaukee, Milwaukee County, Wisconsin.

2. That plaintiff, Metropolitan Sewerage Commission of the County of Milwaukee, is a municipal body corporate, with its principal office at Sewage Disposal Plant, Jones Island, Post Office Box 2079, in the City of Milwaukee, Milwaukee County, Wisconsin.

3. That defendant, State of Wisconsin Department of Natural Resources, is an administrative agency of the

State of Wisconsin, with its principal office at 4610 University Avenue, in the City of Madison, Dane County, Wisconsin.

4. That the annexed Stipulation between the parties is hereby approved as fair and reasonable.

5. That the annexed Stipulation is incorporated herein by reference and its terms are adopted as the judgment of this Court.

6. That no costs are awarded to any party.

Dated this 25th day of May, 1977.

BY THE COURT:
/s/ WILLIAM C. SACHTJEN
Circuit Judge

Appendix I

STATEMENT OF FUNDING INTENT

Whereas, on June 16, 1976, Milwaukee County Executive William F. O'Donnell appointed an ad hoc committee designated the "Advisory Task Force on Metropolitan Sewerage Commission Development" to review the problems of adequate waste treatment in the District service area, and to recommend solutions to those problems designed to achieve the treatment standards and to accomplish the water quality goals of the FWPCA and ch. 147, Wis. Stats., and,

Whereas, the Task Force has estimated that a total program cost of $669.7 million (1976 dollars) will be required to accomplish these goals; and,

Whereas, the Department has estimated that $319.1 million in federal financial assistance will be available through fiscal year 1979 to the Commissions to finance the above-named waste water treatment facilities improvement with such estimates predicated on Congressional authorization and appropriation at $5 billion per fiscal year; and,

Whereas, the program of sewerage system improvement as recommended by the "Task Force" anticipates a contribution of twelve-and-one-half percent state funding of eligible project costs for the combined sewer overflow project; and,

Whereas, the continuous availability of state or federal financial assistance for the Milwaukee area projects will enable the necessary work to be completed in the most effective and expeditious manner; and,

Whereas, a Stipulation has been agreed to by the parties in the action entitled, *The Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee v. The State of Wis-*

consin Department of Natural Resources, case no. 152-342; and,

Whereas, it is recognized by the parties to that Stipulation that they cannot bind the federal government nor obligate state or federal funds in advance, the parties to that Stipulation hereby state their mutual understanding that:

(1) It is the mutual sense of the parties to that Stipulation that the availability of state and federal funding will be essential to the timely completion of the requirements of this agreement; and

(2) It is the intent and policy of the Department, [consistent with its statutory and constitutional responsibilities,] to utilize available state and federal financial assistance to the maximum extent possible to enable achievement of water quality goals in the District.

(3) Nothing in this "Statement of Funding Intent" diminishes the Commissions' obligation to raise and expend local funds as called for by that Stipulation, to obligate the available federal and state monies, or, in the absence of available federal and/or state monies to expend the minimum local funds called for by that Stipulation.

Dated this 30th day of March, 1977, in Milwaukee, Wisconsin.

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE

By /s/ DONALD LAPREST
Donald A. LaPrest, Chairman

Attest: /s/ ROBERT A. BORCHARDT
Robert A. Borchardt, Secretary

Dated this 30th day of March, 1977, in Milwaukee, Wisconsin.

THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE

By /s/ NORBERT A. FRIDL
Norbert A. Fridl, Chairman

Attest: /s/ ROBERT A. BORCHARDT,
Robert A. Borchardt, Secretary

Dated this 22nd day of April, 1977, in Madison, Wisconsin.

THE STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES

By /s/ ANTHONY S. EARL
Anthony S. Earl, Secretary
(Seal)

Dated this 25th day of May, 1977, Madison, Wisconsin.

THE STATE OF WISCONSIN DEPARTMENT OF JUSTICE

By /s/ BRONSON C. LA FOLLETTE
Bronson C. La Follette, Attorney General

APPROVED this ——— day of ————, 1977.

No. 79-408

Supreme Court, U. S.
FILED
OCT 22 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO BRIEF OF RESPONDENT PEOPLE OF THE STATE OF ILLINOIS

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APPENDIX TO BRIEF FOR RESPONDENT PEOPLE OF THE STATE OF ILLINOIS

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No. 79-408

IN THE

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OCTOBER TERM, 1979

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO BRIEF OF RESPONDENT PEOPLE OF THE STATE OF ILLINOIS

I.

STATUTORY PROVISIONS INVOLVED

A.

U.S. Constitution

1. Article III.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of

the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

2. Article VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

B.

Federal Statutes Governing Subject Matter Jurisdiction and Choice of Law

1. 28 U.S.C. § 1251.

(a) The Supreme Court shall have original and exclusive jurisdiction of:

(1) All controversies between two or more States;

(2) All actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, not inconsistent with the law of nations.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings brought by ambassadors or other public ministers of foreign states or to which consuls or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

2. 28 U.S.C. § 1652

The laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

C.

State Statutes Relating to Causes of Action Asserted

1. Ill. Rev. Stat. ch. 111½ § 1012(a) (1979).

§ 1012. No person shall:

(a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act;

2. Ill. Rev. Stat. ch. 14 §§ 11, 12 (1979).

§ 11 Definitions. The following items as used in this Act shall, unless the context otherwise requires, have the following meanings:

(a) "Air pollution" means air pollution as defined in the Environmental Protection Act, enacted by the 76th General Assembly.

(b) "Water pollution" means water pollution as defined in the Environmental Protection Act, enacted by the 76th General Assembly.

(c) "Land pollution" means land pollution and refuse disposal as set out in the Environmental Protection Act enacted by the 76th General Assembly.

§ 12 The Attorney General has the power and authority, notwithstanding and regardless of any proceeding instituted or to be instituted by or before the Environmental Protection Agency, Pollution Control Board or any other administrative agency, to prevent air, land or water pollution within this State by commencing an action or proceeding in the circuit court of any county in which such pollution has been, or is about to be, caused or has occurred, in order to have such pollution stopped or prevented either by mandamus or injunction. The court shall specify a time, not exceeding 21 days after the service of the copy of the petition of mandamus or injunction for answer, and in the meantime the party shall be restrained from continuing such pollution pending hearing before the court. In case of default, or after answer, the court shall immediately inquire into the facts and circumstances of the case and enter an appropriate order in respect to the matters complained of. An appeal may be taken from the final judgment in the same manner and with the same effect as appeals are taken from judgments of the circuit court in other actions for mandamus or injunction.

D.

Statutes With Respect To *In Personam* Jurisdiction

1. Fed. R. Civ. P. 4(e).

(e) *Same: Service Upon Party Not Inhabitant Of Or Found Within State.* Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

2. Ill. Rev. Stat. ch. 110 §§ 16, 17.

§ 16 Personal service outside State.

(1) Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of summons within this State; otherwise it shall have the force and effect of service by publication.

(2) The service of summons shall be made in like manner as service within this State, by any person over 18 years of age not a party to the action. No order of court is required. An

affidavit of the server shall be filed stating the time, manner and place of service. The court may consider the affidavit, or any other competent proofs, in determining whether service has been properly made.

(3) No default shall be entered until the expiration of at least 30 days after service. A default judgment rendered on such service may be set aside only on a showing which would be timely and sufficient to set aside a default judgment rendered on personal service within this State.

§ 17 Act submitting to jurisdiction—Process.

(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:

(a) The transaction of any business within this State;

(b) The commission of a tortious act within this State;

(c) The ownership, use, or possession of any real estate situated in this State;

(d) Contracting to insure any person, property or risk located within this State at the time of contracting;

(e) With respect to actions of dissolution of marriage and legal separation, the maintenance in this State of a matrimonial domicile.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this Section, may be made by personally serving the summons upon the defendant outside this State, as provided in this Act, with the same force and effect as though summons had been personally served within this State.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this Section.

(4) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

E.

Statutes Governing Venue

42 U.S.C. § 1391(b).

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

F.

Statutory Provisions Relating to Defenses by Milwaukee

Cost-Effective

1. 33 U.S.C. § 1292(2)(B), (C).

(B) In addition to the definition contained in subparagraph (A) of this paragraph, "treatment works" means any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste, including storm water runoff, or industrial waste, including waste in combined storm water and sanitary sewer systems. Any application for construction grants which includes wholly or in part such methods or systems shall, in accordance with guidelines published by the Administrator pursuant to subparagraph (C) of this paragraph, contain adequate data and analysis demonstrating such proposal to be, over the life of such

works, the most cost efficient alternative to comply with sections 301 or 302 of this act, or the requirements of section 201 of this act.

(C) For the purposes of subparagraph (B) of this paragraph, the Administrator shall, within one hundred and eighty days after the date of enactment of this title, publish and thereafter revise no less often than annually, guidelines for the evaluation of methods, including cost-effective analysis, described in subparagraph (B) of this paragraph.

2. 33 C.F.R. Part 35, subpart E, Appendix A [43 Fed. Reg. 44807 (September 27, 1978)].

* * *

4. *Definitions.* Terms used in these guidelines are defined as follows:

* * *

b. *Cost-effectiveness analysis.* An analysis performed to determine which waste treatment management system or component part will result in the minimum total resources costs over time to meet Federal, State, or local requirements.

* * *

G.

Statutory Provisions Relating To Congressional Intent To Preserve The Application Of State Statutory Law And Common Law To Impose More Stringent Antipollution Control Through Either Administrative Or Judicial Action.

1. 33 U.S.C. § 1365(e).

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or

common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

2. 33 U.S.C. § 1370.

Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Anthony S. Earl
Secretary

BOX 7921
MADISON, WISCONSIN 53707

CERTIFIED MAIL **IN REPLY REFER TO: 3420**
RETURN RECEIPT REQUESTED **WI-0026875-1**

Messrs. Herbert A. Goetsch, Comm. of Public Works &
Edwin J. Laszewski, City Engineer
City of Milwaukee
841 North Broadway, Room 516
Milwaukee, Wisconsin 53200

RE: Modification of WPDES Permit No. WI-0026875

Dear Sirs:

The request for modification of Wisconsin Pollutant Discharge Elimination System (WPDES) Permit No. WI-0026875 initiated by you on April 13, 1976 has been processed in accordance with Section 147.03, Wisconsin Statutes. This modification updates the original permit incorporating all past modifications and the recent request adding 18 sanitary sewer relief sites and deleting the crossovers which have been eliminated. It also adds in Part A.6, the requirement for a program of identification and correction of illegal connections in the sanitary sewer system tributary to the 18 added relief sites.

The pages which are attached, namely, page 1 of 8 through 8 of 8 of Part II, dated December 10, 1976, replace page 1 of 7 through page 7 of 7 of Part II of the original permit issued on December 18, 1974. Please replace the original pages with these attached pages in all copies of the permit which you retain in your records. All discharges from this facility and actions or reports relating thereto shall be in accordance with the terms and conditions of the original permit as modified.

The WPDES permit program has been approved by the Administrator of the U.S. Environmental Protection Agency pursuant to Section 402(b) of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. Section 1342(b)). Therefore, this permit is subject to enforcement under Section 147.21 and 147.29, Wisconsin Statutes and Section 309 of the Federal Act (33 U.S.C. Section 1319).

Andrew C. Damon
Administrator
Division of Enforcement

Dated Dec 17, 1976
Enclosures
Permit

cc: U.S. Environmental Protection Agency
ATTN: Permits Branch
Southeast District
Southeastern WI-RPC

December 17, 1976

SPECIAL CONDITIONS[1]

A. Sanitary Sewer Crossovers (Gravity) and Electrically Operated Relief Pumps—Discharge Serial Number 001 through 089.

The City of Milwaukee is required to initiate a program leading to the elimination of the sanitary sewer crossovers (gravity) and the electrically operated relief pumps at discharge points 001 through 089 (as identified below) to assure attainment of all applicable Water Quality Standards.

1. On or before December 31, 1975, the City shall submit to the Wisconsin Department of Natural Resources a plan for the elimination of discharge points 001 through 089. Such plan shall include alternative engineering solutions for the elimination of each discharge point, a recommended solution for the elimination of each discharge point, an estimate of cost for the elimination of each discharge point and a time schedule for the elimination of each discharge point. If it is determined by the Department that the plan is incomplete or inadequate, the plan may be returned to the City with the reasons therefor, following which the plan shall be modified by the City and resubmitted within 60 days. After acceptance by the Department of an adequate plan, this permit may be modified to incorporate the specific provisions and time schedules contained in the plan.

2. On or before March 31, 1975, the City shall submit to the Department a listing of discharge 001 through 089 which identifies which of the discharges take place under normal dry weather conditions and which take place only under wet weather conditions.

---

[1] This listing includes all past modifications, and the discharge serial numbers may vary from those specifically identified in the text. Provisions of the permit apply to all new additions.

3. On or before June 30, 1975, the City shall complete "Attachment A" for each discharge 001 through 089, and submit the completed forms to the Department.

4. On or before September 30, 1976, the City shall prepare and submit to the Department an Infiltration/Inflow Analysis for the separate sanitary sewer system. The Analysis shall be based on the Federal Guidelines for Sewer System Evaluation, March, 1974, EPA 520/9-74-018. On or before March 31, 1975, the City shall submit to the Department a plan of study for conduction the Infiltration/Inflow Analysis; such plan of study to include a time schedule for the accomplishment of specific tasks. Based on the results of the Analysis, a more detailed sewer system evaluation survey may be required.

5. On or before March 31, 1975, the City shall identify to the Department 10 discharge points (chosen from 001 through 089) which are considered by the City to have the most significant impact on water quality. Following concurrence by the Department, the City shall by December 31, 1975, install equipment to continuously measure all flows discharged from the 10 selected discharges and shall install equipment to adequately sample the flow discharged. Beginning on March 31, 1976, and every three months thereafter until the discharges are eliminated, the City shall submit a report to the Department containing data on the date of discharge, volume of discharge and sample analysis for each discharge. Each sample shall be analyzed [*sic*] for BOC, Suspended Solids, pH, Fecal Coliform and any other parameter that the Department may require.

6. For discharge points 089f, 089g, 089h, 089i, 089j, 089k, 089L, 089m, 089n, 089o, 089p, 089q, 089r, 089s, 089t, 089u, 089v, 089w, the City shall institute a program to identify any and all illegal clear water connections in the tributary sanitary sewer system, including but not be

limited to, roof drains, foundation drains, and storm water inlets. By October 1, 1977[2], the City shall submit for approval a report to the Department detailing the method and manpower used in the identification program, indicating the type and location of all illegal connections found and establishing a program and time schedule for correction of the illegal connections.

Serial Number	Location
002	N. 30th Street and W. Hope Avenue
003	N. 31st Street (Ext) and W. Hope Avenue (Ext)
004	N. 31st Street and W. Villard Avenue (12" diameter crossover)
006	N. 41st Street and W. Congress Street
010	N. 68th Street and W. Center Street
011	N. 20th Street at W. Fairmount Avenue
015	W. Capitol Drive (N/S) and N. 31st Street
016	W. Capitol Drive (S/S) and N. 31st Street
017	W. Sherman Boulevard and W. Fond du Lac Avenue
019	N. 36th Street between W. Carmen Avenue and W. Florist Ave.
021	W. Center Street at N. 86th Street
022	N. 35th Street, 40 feet north of W. Oriole Drive
023	S. 36th Street at W. Lakefield Drive
024	W. Center Street at N. 88th Street
025	W. Ruskin Street at S. 38th Street
026	W. Silver Spring Drive at N. 38th Street
027	W. Silver Spring Drive at N. 37th Street
028	W. Silver Spring Drive at N. 36th Street
029	W. Silver Spring Drive at N. 35th Street
031	N. 89th Street at W. Townsend Street
032	N. 90th Street at W. Townsend Street
033	W. Dickinson Street and S. 62nd Street
034	W. Hope Avenue and N. 47th Street

Serial Number	Location
035	W. Silver Spring Drive and N. 39th Street
036	W. Silver Spring Drive and N. 41st Street
037	W. Stevenson Street and N. 71st Street
038	W. Mt. Vernon Avenue and N. 69th Street
039	W. Morgan Avenue at S. 57th Street
041	W. Mt. Vernon Avenue at 75 feet east of N. 91st Street
042	N. 41st Street and Congress Street
043	N. 66th Street 1/2 block between W. Congress Street & W. Ruby Ave.
044	N. 94th Street and W. Townsend Street
045	N. 95th Street and W. Metcalf Pl.
046	E. Armor Avenue 69 feet west of S. Austin Street
047	N. 89th Street and W. Center Street
048	N. 87th Street and W. Center Street
049	N. 44th Street 285 feet south of W. Burleigh Street
050	N. 53rd Street at W. Glendale Avenue
051	N. 53rd Street at W. Courtland Avenue (Ext)
052	S. Austin Street at W. Dakota Street
053	N. 27th Street 404 feet south of W. Hope Avenue
054	E. Ohio Street and S. Quincy Avenue
055	W. Lawn Avenue and N. Milwaukee River Parkway
056	N. Milwaukee River Parkway and vacated W. Wilson Drive
057	W. Fairmont Avenue and N. 19th Place
058	W. Fairmont Avenue and N. Green Bay Road
059	S. 43rd Street and W. Morgan Avenue
*060	N. 20th Street at W. Hampton Avenue (North Side)
*061	N. 20th Street at W. Hampton Avenue (South Side)
*062	N. 19th Place at W. Fairmont Avenue
*063	N. 49th Street at W. Luscher Avenue
*064	N. 60th Street at Custer Avenue

Serial Number	Location
*065	5384 N. 60th Street
*066	N. 61st Street at W. Lawn Avenue
*067	5373 N. 60th Street
*068	5344 N. 60th Street
*069	N. 63rd Street at W. Fairmount Avenue
*070	N. 64th Street at W. Stark Street
*071	5030 N. 55th Street
*072	N. 66th Street at W. Ruby Avenue
*073	N. 96th Street at W. Auer Avenue
*074	N. 99th Street at W. Concordia Avenue
*075	S. 46th Street at W. Cleveland Avenue
*076	Mid-block W. Lincoln Ave. between S. 36th Street & S. 37th St.
*077	N. Milwaukee River Parkway at W. Lawn Avenue
*078	N. Milwaukee River Parkway, north of W. Lawn Avenue
*079	N. 58th Street at W. Sheridan Avenue
*080	S. 72nd Street at W. Honey Creek Parkway
*081	S. 77th Street at W. Oklahoma Avenue
*082	3253 S. 57th Street
*083	S. 54th Street at W. Midland Drive
*084	92nd Street at W. Howard Avenue
*086	S. Howell Avenue at E. Edgerton Avenue
*087	S. Burrell Street at E. Van Norman Avenue
*088	W. Monrovia Avenue at W. Crossfield Avenue
*089	S. 94th Street at W. Howard Avenue
089a	W. Olive, 435 feet SE of W. Roosevelt
089c	N. 89th and W. Center (south half)
089d	N. 92nd and W. Hawthorne
089e	N. 92nd and W. Park Hill
*089f	S. 1st Place and W. Bolivar Avenue (S/S)
*089g	N. 37th Street and W. Kiley Avenue
*089h	N. 43rd St. (W/S) and W. Douglas Avenue
*089i	N. 53rd Street and W. Sheridan Avenue

* Electric Relief Pump at this location.

Serial Number	Location
*089j	N. 57th Street and W. Silver Spring Drive (N/S)
*089k	N. 60th Street (W/S) and W. Thurston Avenue
* 089L	W. Riverbend Drive and S. Honey Creek Parkway
*089m	N. 72nd Street and W. Fairmount Avenue
*089n	N. 72nd Street and W. Hope Avenue
*089o	S. 86th and W. Ohio Avenue
*089p	N. 106th Street and W. Lawn Avenue
*089q	N. 107th Street and W. Silver Spring Drive (S/S)
*089r	W. Green Ave., Mid-block between W. Iona Terr. & S. 31st St.
*089s	W. Parnell Avenue and S. Honey Creek Drive
*089t	S. Pine Avenue and E. Cudahy Avenue
*089u	N. 72nd Street and W. Capitol Drive
*089v	N. 74th Street and W. Potomac
089w	East Newport Court, 415 feet E. of North Lake Drive

B.[1] Combined Sewer Crossovers and Overflows—Discharge Serial Number 090 through 213.

The City of Milwaukee is required to initiate a program leading to the attainment of control of overflows from the City's combined sewer system at discharge points 090 through 213 (as identified below), to assure attainment of all applicable Water Quality Standards.

1. The City is to cooperate with and assist the Sewerage Commission of the City of Milwaukee in the conduct and completion of the facilities planning as provided in Treatment Works Grant C550772-01. The facilities planning elements include a feasibility study, cost-effectiveness analysis and environmental assessment for elimination or control of the discharges from the combined sewers.

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* Electric Relief Pump at this location.

[1] This listing includes all past modifications, and the discharge serial numbers may vary from those specifically identified in the text. Provisions of the permit apply to all new additions.

2. Beginning on March 31, 1975 and continuing every three months thereafter until completion of the facilities planning, the City shall submit progress reports to the Department of Natural Resources, WPDES Permit Section.

3. On or before March 31, 1975, the City shall submit to the Department a listing of discharges 090 through 213 which identifies which of the discharges take place under normal dry weather conditions and which taken [*sic*] place only under wet weather conditions.

4. On or before June 30, 1975, the City shall complete "Attachment A" for each discharge 090 through 213, and submit the completed forms to the Department.

5. On or before March 31, 1975, the City shall identify to the Department 15 discharge points (chosen from 090 through 213) which are considered by the City to have the most significant impact on water quality. Following concurrence by the Department, the City shall by December 31, 1975, install equipment to continuously measure all flows discharged from the 15 selected discharges and shall install equipment to adequately sample the flow discharged. Beginning March 31, 1976, and every three months thereafter until the discharges are eliminated or controlled, the City shall submit a report to the Department containing data on the date of discharge, volume of discharge and sample analysis for each discharge. Each sample shall be analyzed for BOD, Suspended Solids, pH, Fecal Coliform and any other parameter that the Department may require. In the event the facilities planning referred to in (a) above identifies more than 15 discharges which will be monitored, the City shall submit, on a quarterly basis, information on all discharges monitored beginning at the close of the quarter during which the monitoring is initiated.

Serial Number	Location
090	N. 26th Street and W. Vienna Avenue
091	N. 37th Street 145 feet north of W. Mt. Vernon Avenue
092	N. 38th Street and W. Mt. Vernon Avenue
093	N. 46th Street and W. State Street
094	E. Meinecke Avenue and N. Gordon Place
095	W. Hilda Place and S. 38th Street
096	N. Sherman Boulevard at W. Burleigh Street
097	E. Lincoln Avenue at S. Burrell Street
098	E. Lincoln Avenue 150 feet west of S. Greeley Street
099	E. Lincoln Avenue 450 feet west of S. Greeley Street
186a	E. 5th Pl., 175 feet south of W. Harrison Avenue

Combined Sewer Overflows to the Milwaukee River

Serial Number	Location	Size
101	E. Capitol Drive	72″
102	E. Keefe Avenue	54″
103	E. Edgewood Avenue	72″
105	E. Auer Avenue	84″
106	E. Hampshire Street	24″
107	E. Burleigh Street	Dbl—9′6″ × 4′3″
108	E. Chambers Street	21″
109	E. Locust Street	78″
110	E. Park Pl.	60″
111	E. Bradford Avenue	72″
112	E. Boylston Street	72″
113	E. Tunnel Pl.	12″
114	N. Pulaski Street	72″
115	N. Humboldt Avenue	72″
118	N. Marshall Street	24″
119	N. Holton Street	7′ × 4′
120	E. Brady Street	30″
121	N. of E. Walnut Street	96″

Serial Number	Location	Size
122	E. Walnut Street	42″
123	E. Pleasant Street	7′ × 3′
124	N. of W. Cherry Street	5′ × 4′
125	W. Cherry Street	90″
126	E. Lyon Street	18″
127	E. Ogden Avenue	6′ × 3′
128	W. McKinley Avenue	60″
129	W. Juneau Avenue	42″
130	E. Juneau Avenue	42″
131	W. Highland Avenue	9′3″ × 4′6″
132	E. Highland Avenue	36″
133	W. State Street	46″
134	E. State Street	60″
136	W. Kilbourn Avenue	4′6″ × 6′
137	E. Kilbourne Avenue	54″
138	N. of W. Wells Street	30″
139	W. Wells Street	48″
140	E. Wells Street	48″
141	N. of W. Wisconsin Avenue	18″ × 30′
142	W. Wisconsin Avenue	24″
143	E. Wisconsin Avenue	30″
145	W. Michigan Street	54″
146	E. Michigan Street	42″
147	N. of W. Clybourn Street	24″ × 26″
148	W. Clybourn Street	48″
149	E. Clybourn Street	Dbl-48″
150	N. of W. St. Paul Avenue	30″
151	W. St. Paul Avenue	6′ × 3′
152	E. St. Paul Avenue	8′6″ × 4′0″
153	E. Buffalo Street	42″
154	E. Chicago Street	6′ × 4′3″
155	S. 1st Street	24″
156	S. Water Street	24″

Serial Number	Location	Size
157	E. Pittsburg Avenue	24″
158	N. Broadway	30″
159	S. of E. Oregon Street	30″
160	E. Florida Street	60″
161	E. Polk Street	54″
163	E. Bruce Street	24″
164a	E. Lyon Street	38″ × 60″
203a	N. 35th Street and W. Congress St.	Dbl. 10′0″ x 7′6″

Combined Sewer Overflows to the Kinnickinnic River

Series Number	Location	Size
165	E. National Avenue	48″
166	E. Walker Street	6′ × 4′6″
167	S. of E. Walker Street	Dbl. 6′6″ × 5′0″
168	S. of E. Washington Street	36″
169	E. Greenfield Avenue	5′6″ × 3′0″
170	S. Kinnickinnic Avenue	30″
171	S. Kinnickinnic Avenue	60″
172	S. 1st Street	42″
173	S. 1st Street	42″
174	S. 2nd Street	78″
175	W. Rogers Street	72″
176	W. Becher Street	12′ × 6′
177	W. Becher Street	96″
178	W. Lincoln Avenue	30″
179	W. Lincoln Avenue	48″
180	S. Chase Avenue	18″
181	S. Chase Avenue	10′ × 5′
182	W. Cleveland Avenue	72″
183	W. Cleveland Avenue	84″
184	S. 8th Street	9′ × 6″
185	S. 14th Street	10′ × 5′
186	S. 27th Street	72″

Combined Sewer Overflows to the Menomonee River

Serial Number	Location	Size
187	S. 2nd Street	54″
189	N. Muskego Avenue	30″
190	N. Muskego Avenue	54″
191	N. 15th Street	Dbl. 7′ × 4′
192	N. 15th Street	7′ × 4′
193	N. 17th Street	5′9″ × 3′6″
194	N. 25th Street	Dbl. 7′ x 7′
195	N. 26th Street	Trp. 7′ x 6′
196	S. 27th Street	48″
197	S. 27th Street	48″
198	S. 35th Street	60″
199	W. Wisconsin Avenue	24″
200	W. Wisconsin Avenue	24″
201	N. 43rd Street	12′ × 6′
202	N. 45th Street	42″
203	N. Hawley Road	8′6″ x 5′0″
203b	N. 9th Street (Ext'd)	96″
203c	S. Stadium Acces [*sic*] Rd. (Ext'd)	Trp. 48′ x 52″ & Dbl. 78″

Combined Sewer Overflows to the South Menomonee Canal—Branch of Menomonee River

Serial Number	Location	Size
204	S. 4th Street	48″
205	S. 6th Street	30″

Combined Sewer Overflows to Burnham's Canal—Branch of Menomonee River

Serial Number	Location	Size
206	S. 9th Street	36″
207	S. 9th Street	78″
208	S. 11th Street	36″
209	S. 13th Street	36″
210	S. 13th Street	60″
211	S. Muskego Avenue	54″

Combined Sewer Overflows to Lake Michigan

Serial Number	Location	Size
212	E. Bay Street	Dbl. 7'6" × 6'6"
213	E. Russel Avenue	10'

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES
Anthony S. Earl
Secretary
BOX 7921
MADISON, WISCONSIN 53707

CERTIFIED MAIL
RETURN RECEIPT REQUESTED IN REPLY REFER TO: 3420

Mr. Herbert A. Goetsch
Commissioner of Public Works
City of Milwaukee
841 North Broadway—Room 516
Milwaukee, Wisconsin 53202

Re: WPDES Permit No. WI-0026875

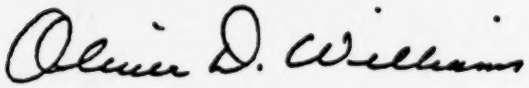
Dear Mr. Goetsch:

Your application WI-0026875 for a Wisconsin Pollutant Discharge Elimination System (WPDES) Permit has been processed in accordance with Section 147.02 and 147.025, Wisconsin Statutes.

The enclosed WPDES permit covers the discharges from the facility located at City of Milwaukee Sanitary Sewer crossovers, combined sewer crossovers, and combined sewer overflows into Milwaukee River, Kinnickinnic River, Menomonee River, South Menomonee Canal-Branch of Menomonee River, Burnham's Canal-Branch of Menomonee River and Lake Michigan. All discharges from this facility and actions or reports relating thereto shall be in accordance with the terms and conditions of this permit.

The WPDES permit program has been approved by the Administrator of the U.S. Environmental Protection Agency pursuant to Section 402(b) of the Federal Water Pollution

Control Act Amendments of 1972 (33 U.S.C. Section 1342(b)). The terms and conditions of this permit are accordingly subject to enforcement under Section 147.21 and 147.29, Wisconsin Statutes and Section 309 of the Federal Act (33 U.S.C. Section 1319).



Oliver D. Williams
Acting Administrator
Division of Environmental Standards

Dated December 18, 1974
Enclosures
Permit
Reporting Forms

cc: U.S. Environmental Protection Agency
ATTN: Permits Branch
Southeast District

PERMIT TO DISCHARGE UNDER THE WISCONSIN POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of Chapter 147, Wisconsin Statutes, THE CITY OF MILWAUKEE

is permitted to discharge from ITS SANITARY SEWER CROSSOVER, COMBINED SEWER CROSSOVERS, AND COMBINED SEWER OVERFLOWS

TO MILWAUKEE RIVER, KINNICKINNIC RIVER, MENOMONEE RIVER, SOUTH MENOMONEE CANAL, BURNHAM'S CANAL AND LAKE MICHIGAN

in accordance with the effluent limitations, monitoring requirements and other conditions set forth in Parts I and II hereof.

This permit shall become effective on the date of signature.

This permit to discharge shall expire at midnight, June 30, 1977.

Permittee shall not discharge after the date of expiration. If the permittee wishes to continue to discharge after this expiration date he shall file an application for reissuance of his permit in accordance with the requirements of Chapter NR 200, Wisconsin Administrative Code, at least 180 days prior to this expiration date.

State of Wisconsin Department of Natural Resources
For the Secretary

By Oliver D. Williams

Oliver D. Williams
Acting Administrator
Division of Environmental Standards

Dated this 18th day of December, 1974

GENERAL CONDITIONS

1. Compliance

All discharges authorized herein shall be consistent with the terms and conditions of this permit. The discharge of any pollutant identified in this permit more frequently than or at a level in excess of that authorized shall constitute a violation of the permit.

2. Adverse Impact

The permittee shall take all reasonable steps to minimize any adverse impact on waters of the State resulting from noncompliance with any effluent limitations specified in this permit, including such special or additional monitoring as may be required by the Department or may be necessary to determine the nature and impact of the noncomplying discharge.

3. Removed Substances

Solids, sludges, filter backwash or other pollutants removed from or resulting from treatment or control of wastewaters or intake waters shall be stored and disposed of in a manner such as to prevent any pollutant from such materials from entering the waters of the State. Land disposal of treatment plant solids and sludges shall be either at a site or operation licensed by the Department under Chapter NR 151, Wisconsin Administrative Code, or in accordance with a sludge disposal plan approved by the Department.

4. Right of Entry

The permittee shall allow authorized representatives of the Department of Natural Resources, and the Administrator of the United States Environmental Protection Agency or his authorized representatives, upon the presentation of credentials:

a. To enter upon the permittee's premises where an effluent source is located or in which any records are required to be kept under the terms and conditions of this permit; and

b. At reasonable times to have access to and copy any records required to be kept under the terms and conditions of this permit; to inspect any monitoring equipment or monitoring method required in this permit; and to sample any wastewaters.

5. Permit Modification

After notice and opportunity for a hearing as provided in Section 147.03, Wisconsin Statutes, this permit may be modified, suspended, or revoked in whole or in part during its term for cause including, but not limited to, the following:

a. Violation of any terms or conditions of this permit;

b. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts; or

c. A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

6. Toxic Pollutants

Nothing in this permit shall be construed to authorize the discharge of any toxic pollutant or combination of pollutants in amounts or concentrations which exceed any applicable toxic effluent standard or prohibition, including any schedule of compliance specified in any such effluent standard or prohibition, promulgated under Section 147.07(1), Wisconsin Statutes.

If a toxic effluent standard or prohibition, including any schedule of compliance specified in such effluent standard or prohibition, is promulgated under Section 147.07(1), Wiscon-

sin Statutes, for a toxic pollutant or combination of pollutants which is present in the discharge and such standard or prohibition is more stringent than any limitation for such pollutant in this permit, this permit shall be revised or modified in accordance with the toxic effluent standard or prohibition.

7. Civil and Criminal Liability

Except as provided in permit conditions on "Bypassing" (Part I,23) and "Power Failures" (Part I,24), nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties under Section 147.21, Wisconsin Statutes, for noncompliance with the terms and conditions of this permit.

8. Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Federal Water Pollution Control Act (33 U.S.C. Section 1321).

9. State Laws

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any other applicable State law or regulation.

10. Property Rights

The issuance of this permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.

11. Severability

The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

12. Schedule of Compliance Progress Reports

No later than 14 calendar days following a date identified in any schedule of compliance in Part II, the permittee shall submit either a report of progress or, in the case of specific actions being required by identified dates, a written notice of compliance or noncompliance. In the latter case, the notice shall include the cause of noncompliance, any remedial actions taken, and the probability of meeting the next scheduled requirements.

13. Test Procedures

Test procedures used for the analysis of pollutants shall be those listed in C .pter NR 219, Wisconsin Administrative Code, or an alternate method authorized in Part II.

14. Recording of Results

For each measurement of sample taken pursuant to the requirements of this permit, the permittee shall record the following information:

a. The exact place, date, and time of sampling;

b. The dates the analyses were performed;

c. The person(s) who performed the analyses;

d. The analytical techniques or methods used; and

e. The results of all required analyses.

15. Additional Monitoring by Permittee

If the permittee monitors any pollutant at the location(s) designated herein more frequently than required by this permit, using approved analytical methods as specified in Chapter NR 219, the results of such monitoring shall be reported to the Department on a quarterly basis.

16. Records Retention

All records and information resulting from the monitoring activities required by this permit including all records of analyses performed and calibration and maintenance of instrumentation and recordings from continuous monitoring instrumentation shall be retained for a minimum of three (3) years, or longer if requested by the Department of Natural Resources.

17. Construction of Onshore or Offshore Structures

This permit does not authorize or approve the construction of any onshore or offshore physical structure of facilities or the undertaking of any work in any navigable waters.

18. Confidential Information

Except for data determined to be confidential under Section 147.08(2)(c), Wisconsin Statutes, all monitoring reports required by this permit shall be available for public inspection at the headquarters of U.S. EPA Region V and the Department of Natural Resources. Knowingly making any false statement on any such report may result in the imposition of criminal penalties as provided for in Section 147.21, Wisconsin Statutes.

19. Transfer of Control of Operation

In the event of a transfer of control of operation of the facility from which the permitted discharges emanate to a person not named on page one (1) of this permit, the permittee

prior to such transfer shall notify his successor by letter that this permit is not transferable and that prior to any discharge after such transfer, a new WPDES permit must be obtained. A copy of this letter shall be forwarded to the Department of Natural Resources, WPDES Permit Section, Box 450, Madison, Wisconsin 53701.

20. Change in Discharge

Facility modifications, additions, and/or expansions that increase the plant capacity must be reported to the Department and this permit then modified or reissued to reflect such changes. Any anticipated change in the facility discharge, including any new significant industrial discharge or significant changes in the quantity or quality of existing industrial discharges of pollutants must be reported to the Department. Modifications to the permit may then be made to reflect any necessary changes in permit conditions, including any necessary effluent limitations for any pollutants not identified and limited herein. In no case are any new connections, increased flows, or significant changes in influent quality permitted that will cause violation of the effluent limitations specified herein.

21. Noncompliance Notification

If for any reason the permittee does not comply with or will be unable to comply with any effluent limitations specified in this permit, or should any unusual or extraordinary discharge of wastes occur from the facilities herein permitted, the permittee shall provide the Department in writing within five days of such occurrence with the following information:

a. A description of the noncomplying discharge including its impact upon the receiving waters.

b. Cause of noncompliance.

c. Anticipated time the condition of noncompliance is expected to continue, or if such condition has been corrected, the duration of the period of noncompliance.

d. Steps taken by the permittee to reduce and eliminate the noncomplying discharge.

e. Steps to be taken by the permittee to prevent recurrence of the condition of noncompliance.

22. Facility Operation and Quality Control

All waste collection, control, treatment and disposal facilities shall be operated in a manner consistent with the following:

a. At all times, all facilities shall be operated as efficiently as possible and in a manner which will minimize discharges of excessive pollutants.

b. Maintenance of the sewer system that results in discharge of untreated wastes to surface waters shall be scheduled during non-critical water quality periods and shall be carried out in a manner approved by the Department.

23. Power Failures

The permittee is responsible for maintaining adequate safeguards to prevent the discharge of untreated or inadequately treated wastes during electrical power failure either by means of alternate power sources, standby generators or retention of inadequately treated effluent. Should the treatment works not have the above capabilities at the time of permit issuance, the permittee must furnish within 120 days to the Department, for approval, plans for such facilities and an implementation schedule for their installation.

24. Pretreatment

The permittee shall require any industrial user of the sewer collection system to provide pretreatment as required under Section 147.07(2), Wisconsin Statutes, to provide any records, reports or information related to any pretreatment or new

source performance standards. Any industrial user of the sewer collection system shall be required by the permittee to prepare and submit to the WPDES Permit Section periodic notices of progress toward full compliance with the requirements of Section 147.07(2), Wisconsin Statutes. Such notices shall be submitted at intervals not to exceed nine (9) months or as required elsewhere in this permit.

25. Prohibited Wastes

Under no circumstances shall the permittee allow introduction into the sewer collection system wastes prohibited by NR 211.10, Wisconsin Administrative Code, which include those

a. Which create a fire or explosion hazard in the treatment works,

b. Which will cause corrosive structural damage to treatment works,

c. Solid or viscous substances in amounts which cause obstructions to the flow in sewers or interference with the proper operation of the treatment works,

d. Wastewaters at a flow rate and/or pollutant discharge rate which is excessive over relatively short time periods so as to cause a loss of treatment efficiency.

e. New wastes or increased volumes or quantities of wastes from major contributing industries in such volumes or quantities as to overload the treatment works or cause a loss of treatment efficiency.

26. Definition Terms

(i) For those terms used in Part I and II which are defined in Section 147.015, Wisconsin Statutes, the meanings of that Section shall apply.

(ii) As used in Daily Effluent Limitations, Part II:

(1) "Average" means the arithmetic mean of daily monitoring test results obtained during a calendar month for the given parameter; that is the total of such daily results, in pounds per day, milligrams per liter, or other appropriate unit divided by the number of days for which results are totaled. For example, if a facility operates or discharges and monitors 30 days during a month the daily average is the sum of daily values in pounds per day, milligrams per liter, or other appropriate unit divided by 30 for each parameter, but if one day's result is missing for any parameter the divisor in that case is 29.

(2) "Maximum" means the highest daily monitoring test result, in pounds per day, milligrams per liter, or other appropriate unit during the calendar month for the given parameter.

(3) "Minimum" means the lowest daily monitoring test result, in the appropriate unit, during the calendar month for the given parameter.

(4) The "average" for fecal coliform bacteria shall be the geometric mean of the samples collected in a reported period.

SPECIAL CONDITIONS

A. Sanitary Sewer Crossovers (Gravity) and Electrically Operated Relief Pumps—Discharge Serial Number 001 through 089.

The City of Milwaukee is required to initiate a program leading to the elimination of the sanitary sewer crossovers (gravity) and the electrically operated relief pumps at discharge points 001 through 089 (as identified below) to assure attainment of all applicable Water Quality Standards.

1. On or before December 31, 1975, the City shall submit to the Wisconsin Department of Natural Resources a plan for the elimination of discharge points 001 through 089. Such plan shall include alternative engineering solutions for the elimination of each discharge point, a recommended solution for the elimination of each discharge point, an estimate of cost for the elimination of each discharge point and a time schedule for the elimination of each discharge point. If it is determined by the Department that the plan is incomplete or inadequate, the plan may be returned to the City with the reasons therefore, following which the plan shall be modified by the City and resubmitted within 60 days. After acceptance by the Department of an adequate plan, this permit may be modified to incorporate the specific provisions and time schedules contained in the plan.

2. On or before March 31, 1975, the City shall submit to the Department a listing of discharge 001 through 089 which identifies which of the discharges take place under normal dry weather conditions and which take place only under wet weather conditions.

3. On or before June 30, 1975, the City shall complete "Attachment A" for each discharge 001 through 089, and submit the completed forms to the Department.

4. On or before September 30, 1976, the City shall prepare and submit to the Department an Infiltration/Inflow Analysis for the separate sanitary sewer system. The Analysis shall be based on the Federal Guidelines for Sewer System Evaluation, March, 1974, EPA 520/9-74-018. On or before March 31, 1975, the City shall submit to the Department a plan of study for conducting the Infiltration/Inflow Analysis; such plan of study to include a time schedule for the accomplishment of specific tasks. Based on the results of the Analysis, a more detailed sewer system evaluation survey may be required.

5. On or before March 31, 1975, the City shall identify to the Department 10 discharge points (chosen from 001 through 089) which are considered by the City to have the most significant impact on water quality. Following concurrence by the Department, the City shall by December 31, 1975, install equipment to continuously measure all flows discharged from the 10 selected discharges and shall install equipment to adequately sample the flow discharged. Beginning on March 31, 1976, and every three months thereafter until the discharges are eliminated, the City shall submit a report to the Department containing data on the date of discharge, volume of discharge and sample analysis for each discharge. Each sample shall be analyzed for BOD, Suspended Solids, pH, Fecal Coliform and any other parameter that the Department may require.

Serial Number	Location
001	N. 25th Street and W. Hope Avenue
002	N. 30th Street and W. Hope Avenue
003	N. 31st Street (Ext.) and W. Hope Avenue (Ext.)
004	N. 31st Street and W. Villard Avenue (12" diameter crossover)
005	N. 31st Street and W. Villard Avenue (8" diameter crossover)
006	N. 41st Street and W. Congress Street
007	N. 47th Street and W. Concordia Avenue
008	N. 47th Street and W. Congress Street
009	N. 49th Street and W. Concordia Avenue
010	N. 68th Street and W. Center Street
011	N. 20th Street at W. Fairmount Avenue
012	S. 3rd Street at W. Saveland Avenue
013	N. 76th Street, 200 feet north of Hadley Street
014	N. 79th Street and W. Locust Street
015	W. Capitol Drive (N/S) and N. 31st Street
016	W. Capitol Drive (S/S) and N. 31st Street
017	N. Sherman Boulevard and W. Fond du Lac Avenue
018	S. Whitnall Avenue and E. Howard Avenue
019	N. 36th Street between W. Carmen Avenue and W. Florist Avenue
020	E. Howard Avenue at S. Pine Avenue
021	W. Center Street at N. 86th Street
022	N. 35th Street, 40 feet north of W. Oriole Drive
023	S. 36th Street at W. Lakefield Drive
024	W. Center Street at N. 88th Street
025	W. Ruskin Street at S. 38th Street
026	W. Silver Spring Drive at N. 38th Street
027	W. Silver Spring Drive at N. 37th Street
028	W. Silver Spring Drive at N. 36th Street
029	W. Silver Spring Drive at N. 35th Street
030	W. Silver Spring Drive at N. 27th Street
031	N. 89th Street at W. Townsend Street

Serial Number	Location
032	N. 90th Street at W. Townsend Street
033	W. Dickinson Street and S. 62nd Street
034	W. Hope Avenue and N. 47th Street
035	W. Silver Spring Drive and N. 39th Street
036	W. Silver Spring Drive and N. 41st Street
037	W. Stevenson Street and N. 71st Street
038	W. Mt. Vernon Avenue and N. 69th Street
039	W. Morgan Avenue at S. 57th Street
040	W. Hadley Street at N. 80th Street
041	W. Mt. Vernon Avenue at 75 feet east of N. 91st Street
042	N. 41st Street and Congress Street
043	N. 66th Street 1/2 block between W. Congress Street and W. Ruby Avenue
044	N. 94th Street and W. Townsend Street
045	N. 95th Street and W. Metcalf Pl.
046	E. Armour Avenue 69 feet west of S. Austin Street
047	N. 89th Street and W. Center Street
048	N. 87th Street and W. Center Street
049	N. 44th Street 285 feet south of W. Burleigh Street
050	N. 53rd Street at W. Glendale Avenue
051	N. 53rd Street at W. Courtland Avenue (Ext.)
052	S. Austin Street at W. Dakota Street
053	N. 27th Street 404 feet south of W. Hope Avenue
054	E. Ohio Street and S. Quincy Avenue
055	W. Lawn Avenue and N. Milwaukee River Parkway
056	N. Milwaukee River Parkway and vacated W. Wilson Drive
057	W. Fairmount Avenue and N. 19th Place
058	W. Fairmount Avenue and N. Green Bay Road
059	S. 43rd Street and W. Morgan Avenue
060	N. 20th Street at W. Hampton Avenue (North Side)
061	N. 20th Street at W. Hampton Avenue (South Side)
062	N. 19th Place at W. Fairmount Avenue
063	N. 49th Street at W. Luscher Avenue

Serial Number	Location
064	N. 60th Street at W. Custer Avenue
065	5384 N. 60th Street
066	N. 61st Street at W. Lawn Avenue
067	5373 N. 60th Street
068	5344 N. 60th Street
069	N. 63rd Street at W. Fairmount Avenue
070	N. 64th Street at W. Stark Street
071	5030 N. 55th Street
072	N. 66th Street at W. Ruby Avenue
073	N. 96th Street at W. Auer Avenue
074	N. 99th Street at W. Concordia Avenue
075	S. 46th Street at W. Cleveland Avenue
076	Mid-block W. Lincoln Avenue between S. 36th Street and S. 37th Street.
077	N. Milwaukee River Parkway at W. Lawn Avenue
078	N. Milwaukee River Parkway, north of W. Lawn Avenue
079	N. 58th Street at W. Sheridan Avenue
080	S. 72nd Street at W. Honey Creek Parkway
081	S. 77th Street at W. Oklahoma Avenue
082	3253 S. 57th Street
083	S. 54th Street at W. Midland Drive
084	92nd Street at W. Howard Avenue
085	S. Howell Avenue at W. Ramsey Avenue
086	S. Howell Avenue at E. Edgerton Avenue
087	S. Burrell Street at E. Van Norman Avenue
088	W. Monrovia Avenue at W. Crossfield Avenue
089	S. 94th Street at W. Howard Avenue

B. Combined Sewer Crossovers and Overflows—Discharge Serial Number 090 through 213.

The City of Milwaukee is required to initiate a program leading to the attainment of control of overflows from the City's combined sewer system at discharge points 090 through 213 (as identified below), to assure attainment of all applicable Water Quality Standards.

1. The City is to cooperate with and assist the Sewerage Commission of the City of Milwaukee in the conduct and completion of the facilities planning as provided in Treatment Works Grant C550772-01. The facilities planning elements include a feasibility study, cost-effectiveness analysis and environmental assessment for elimination or control of the discharges from the combined sewers.

2. Beginning on March 31, 1975 and continuing every three months thereafter until completion of the facilities planning, the City shall submit progress reports to the Department of Natural Resources, WPDES Permit Section.

3. On or before March 31, 1975, the City shall submit to the Department a listing of discharges 090 through 213 which identifies which of the discharges take place under normal dry weather conditions and which taken [*sic*] place only under wet weather conditions.

4. On or before June 30, 1975, the City shall complete "Attachment A" for each discharge 090 through 213, and submit the completed forms to the Department.

5. On or before March 31, 1975, the City shall identify to the Department 15 discharge points (chosen from 090 through 213) which are considered by the City to have the most significant impact on water quality. Following concurrence by the Department, the City shall by

Department [*sic*] 31, 1975, install equipment to continuously measure all flows discharged from the 15 selected discharges and shall install equipment to adequately sample the flow discharged. Beginning March 31, 1976, and every three months thereafter until the discharges are eliminated or controlled, the City shall submit a report to the Department containing data on the date of discharge, volume of discharge and sample analysis for each discharge. Each sample shall be analyzed for BOD, Suspended Solids, pH, Fecal Coliform and any other parameter that the Department may require. In the event the facilities planning referred to in (a) above identifies more than 15 discharges which will be monitored, the City shall submit, on a quarterly basis, information on all discharges monitored beginning at the close of the quarter during which the monitoring is initiated.

Combined Sewer Crossovers—Discharge Serial Numbers 090 through 100 inclusive:

Serial Number	Location
090	N. 26th Street and W. Vienna Avenue
091	N. 37th Street 145 feet north of W. Mt. Vernon Avenue
092	N. 38th Street and W. Mt. Vernon Avenue
093	N. 46th Street and W. State Street
094	E. Meinecke Avenue and N. Gordon Place
095	W. Hilda Place and S. 38th Street
096	N. Sherman Boulevard at W. Burleigh Street
097	E. Lincoln Avenue at S. Burrell Street
098	E. Lincoln Avenue 150 feet west of S. Greeley Street
099	E. Lincoln Avenue 450 feet west of S. Greeley Street
100	N. 37th Street 11 feet north of W. Mt. Vernon Avenue

Combined Sewer Overflows to the Milwaukee River—Discharge Serial Numbers 101 through 164 inclusive:

Serial Number	Location
101	E. Capitol Drive
102	E. Keefe Avenue
103	E. Edgewood Avenue
104	E. Auer Avenue (36″)
105	E. Auer Avenue (84″)
106	E. Hampshire Street
107	E. Burleigh Street
108	E. Chambers Street
109	E. Locust Street
110	E. Park Place
111	E. Bradford Avenue
112	E. Boylston Street
113	E. Tunnel Place
114	N. Pulaski Street
115	N. Humboldt Avenue
116	Point 350 feet west of N. Humboldt Avenue
117	Point 800 feet west of N. Humboldt Avenue
118	N. Marshall Street
119	N. Holton Street
120	E. Brady Street
121	North of E. Walnut Street (96″)
122	E. Walnut Street
123	E. Pleasant Street
124	North of Cherry Street
125	W. Cherry Street (90″)
126	E. Lyon Street
127	E. Ogden Avenue
128	W. McKinley Avenue
129	W. Juneau Avenue
130	E. Juneau Avenue
131	W. Highland Avenue

Serial Number	Location
132	E. Highland Avenue
133	W. State Street
134	E. State Street
135	W. Kilbourn Avenue (36″)
136	W. Kilbourn Avenue (4′-6″ × 6′)
137	E. Kilbourn Avenue
138	North of W. Wells Street (30″)
139	W. Wells Street (48″)
140	E. Wells Street
141	North of W. Wisconsin Avenue (18″ × 30″)
142	W. Wisconsin Avenue (24″)
143	E. Wisconsin Avenue
144	North of W. Michigan Street (30″)
145	W. Michigan Street (54″)
146	E. Michigan Street
147	North of W. Clybourn Street (24″ × 26″)
148	W. Clybourn Street (48″)
149	E. Clybourn Street
150	North of W. St. Paul Avenue (30″)
151	W. St. Paul Avenue
152	E. St. Paul Avenue
153	E. Buffalo Street
154	E. Chicago Street
155	S. 1st Street
156	S. Water Street
157	E. Pillsburgh Avenue
158	N. Broadway
159	South of E. Oregon Street
160	E. Florida Street
161	E. Polk Street
162	E. Harbor Place
163	E. Bruce Street
164	North of W. Juneau Avenue (36″)

Combined Sewer Overflows to the Kinnickinnic River—Discharge Serial Numbers 165 through 186 inclusive:

Serial Number	Location
165	E. National Avenue
166	E. Walker Street
167	South of E. Walker Street
168	South of E. Washington Street
169	E. Greenfield Avenue
170	S. Kinnickinnic Avenue (30″)
171	S. Kinnickinnic Avenue (60″)
172	S. 1st Street N. (42″)
173	S. 1st Street S. (42″)
174	S. 2nd Street
175	W. Rogers Street
176	W. Becher Street (12′ × 6′)
177	W. Becher Street (96″)
178	W. Lincoln Avenue (30″)
179	W. Lincoln Avenue (48″)
180	S. Chase Avenue (18″)
181	S. Chase Avenue (10′ × 5′)
182	W. Cleveland Avenue (72″)
183	W. Cleveland Avenue (84″)
184	S. 8th Street
185	S. 14th Street
186	S. 27th Street

Combined Sewer Overflows to the Menomonee River—Discharge Serial Numbers 187 through 203 inclusive:

Serial Number	Location
187	S. 2nd Street
188	West of N. 8th Street
189	S. Muskego Avenue (30″)
190	S. Muskego Avenue (54″)
191	N. 15th Street (D61-7′ × 4′)

Serial Number	Location
192	N. 15th Street (7′ × 4′)
193	N. 17th Street
194	N. 25th Street
195	N. 26th Street
196	S. 27th Street (48″)
197	S. 27th Street N. (48″)
198	S. 35th Street
199	W. Wisconsin Avenue (24″F)
200	W. Wisconsin Avenue (24″)
201	N. 43rd Street
202	N. 45th Street
203	N. Hawley Road

Combined Sewer Overflows to the South Menomonee Canal-Branch of Menomonee River—Discharge Serial Numbers 204 and 205:

Serial Number	Location
204	S. 4th Street
205	S. 6th Street

Combined Sewer Overflows to Burnham's Canal-Branch of Menominee River—Discharge Serial Numbers 206 through 211 inclusive:

Serial Number	Location
206	S. 9th Street (36″)
207	S. 9th Street (78″)
208	S. 11th Street
209	S. 13th Street (36″)
210	S. 13th Street (60″)
211	S. Muskego Avenue

Combined Sewer Overflows to Lake Michigan—Discharge Serial Numbers 212 and 213:

Serial Number	Location
212	E. Bay Street
213	E. Russell Avenue

"Attachment A"

1. Discharge Serial Number: _____

2. Discharge Location: _____

3. Name of Receiving Water: _____

4. Occurrence (check when discharge occurs)

Wet Weather _____Yes, _____No
Dry Weather _____Yes, _____No

5. Frequency (Give the actual or approximate number of incidents per year)

Wet Weather _____ times per year
Dry Weather _____ times per year

6. Duration (Give the average duration per incident in hours)

Wet Weather _____ hours
Dry Weather _____ hours

7. Volume (Give the average volume per incident in thousand gallons)

Wet Weather _____ thousand gallons per incident
Dry Weather _____ thousand gallons per incident

8. Reason (Give brief reason or justification for discharge)

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES
Anthony S. Earl
Secretary
BOX 7921
MADISON, WISCONSIN 53707

CERTIFIED MAIL **IN REPLY REFER TO: 3420**
RETURN RECEIPT REQUESTED **WI-0024767-2**

Mr. Robert J. Borchardt
Chief Engineer & General Manager
Sewage Commission of the City of Milwaukee
Jones Island Wastewater Treatment Plant
P.O. Box 2079
Milwaukee, Wisconsin 53201

RE: WPDES Permit No. WI-0024767-2

Dear Mr. Borchardt:

Your application WI-0024767-2 for a Wisconsin Pollutant Discharge Elimination System (WPDES) Permit has been processed in accordance with Sections 147.02 and 147.03(3), Wisconsin Statutes.

The enclosed WPDES permit covers the discharges from the facility located at 700 East Jones Street, Milwaukee, Wisconsin into Lake Michigan and tributary streams in Milwaukee County. All discharges from this facility and actions or reports relating thereto shall be in accordance with the terms and conditions of this permit.

The WPDES permit program has been approved by the Administrator of the U.S. Environmental Protection Agency pursuant to Section 402(b) of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. Section 1342(b)). The terms and conditions of this permit are accordingly subject to enforcement under Sections 147.21 and 147.29, Wisconsin Statutes and Section 309 of the Federal Act (33 U.S.C. Section 1319).

The Judgment entered on May 25, 1977 in the matter of *The Sewerage Commission of the City of Milwaukee, et al* vs. *Wisconsin Department of Natural Resources (*Case No. 152-342, Dane County Circuit Court, State of Wisconsin), and the Judgment entered on November 15, 1977 in the matter of *People of Illinois* vs. *City of Milwaukee, et al* (Case No. 72-C-1253; U.S.D.C., N. Dt. of Ill.) impose legal obligations and requirements on the permittee which are independent of the terms of this permit and in no way affected by the issuance of this permit.

Thomas Kroehn
Administrator
Division of Environmental Standards

Date Feb. 28, 1978
Enclosures
Permit

cc: U.S. Environmental Protection Agency
ATTN: Permits Branch
Southeast District

PERMIT TO DISCHARGE UNDER THE WISCONSIN POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of Chapter 147, Wisconsin Statutes, SEWAGE COMMISSION OF THE CITY OF MILWAUKEE JONES ISLAND is permitted to discharge from a wastewater treatment facility located at

700 EAST JONES STREET
MILWAUKEE, WISCONSIN 53201

to LAKE MICHIGAN AND TRIBUTARY STREAMS IN MILWAUKEE COUNTY in accordance with the effluent limitations, monitoring requirements and other conditions set forth in this permit.

All discharges authorized herein shall be consistent with the terms and conditions of this permit. The discharge of any pollutant identified in this permit more frequently than or at a level in excess of that authorized shall constitute a violation of the permit.

This permit shall become effective on the date of signature.

This permit to discharge shall expire at midnight, June 30, 1982.

The permittee shall not discharge after the date of expiration. If the permittee wishes to continue to discharge after this expiration date an application shall be filed for reissuance of this permit in accordance with the requirements of Chapter NR 200, Wisconsin Administrative Code, at least 180 days prior to this expiration date.

State of Wisconsin Department of Natural Resources
For the Secretary

By

Thomas A. Kroehn
Administrator
Division of Environmental Standards

Dated this 28th day of Feb., 1978

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A) Bypass an Overflow Report	July 15, 1978
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C) NR 101 Industrial Reports	December 31, 1978
D) Industrial Pretreatment Report	June 30, 1978

Part III —Schedule of Compliance
None needed
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PART I. MONITORING REQUIREMENTS

1. Reporting

a. Monitoring results obtained during the previous month shall be summarized and reported on a WPDES Self-Monitoring Report Form, #3200-28, postmarked no later than the 15th day of the month following the completed reporting period. The first report for the month of March, 1978 is due on or before April 15, 1978. The white and green copies of 3200-28 shall be submitted to:

Wisconsin Department of Natural Resources
Environmental Protection Section—Permits
Southeast District Headquarters
Box 13248
Milwaukee, Wisconsin 53226

The pink report copy is to be retained by the permittee.

b. Monitoring reports shall be signed by a principal executive officer, a ranking elected official, or other duly authorized representative.

c. If the permittee monitors any pollutant more frequently than required by this permit, the results of such monitoring shall be included on form #3200-28.

d. Sampling and laboratory testing procedures shall be performed in accordance with Chapters NR 218 and NR 219 of the Wisconsin Administrative Code.

A. INFLUENT MONITORING REQUIREMENTS

During the period beginning on the effective date of this permit and lasting until June 30, 1982 the permittee is required to perform the following monitoring.

Samples taken in compliance with the monitoring requirements specified below shall be taken at a point following the coarse screens and preceding the grit chambers.

Parameter	Units	Monitoring Requirements: Sample Frequency	Monitoring Requirements: Sample Type
Flow[1]	MGD	Continuous	
BOD_5-day	mg/l	Daily	24-hour composite
Suspended Solids	mg/l	Daily	24-hour composite
Phosphorus	mg/l	Daily	24-hour composite

[1] Flow measurement of the wastewater volume received at the treatment plant, including any bypassed flow, shall be monitored continuously.

B. EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

During the period beginning on the effective date of this permit and lasting until June 30, 1982 the permittee is authorized to discharge from outfall serial number 001.

Samples taken in compliance with the monitoring requirements specified below shall be taken at the combined outfall following the disinfection process and immediately prior to discharge to Lake Michigan.

Effluent Parameters	Effluent Limitations: Quantity-kg/day (lbs/day) Other Limitations (Specify Units): Average[1]	Maximum	Minimum	Average	Maximum	Monitoring Requirements: Sample Frequency	Sample Type
Flow-M^3/Day (MGD)	—	—	—	—	—	Continuous	
BOD_5 (monthly)	22,670(50,040)	—	—	30 mg/l	—	Daily	24-hour composite
BOD_5 (weekly)	34,000(75,060)	—	—	45 mg/l	—	Daily	24-hour composite
Suspended Solids (monthly)	22,670(50,040)	—	—	30 mg/l	—	Daily	24-hour composite
Suspended Solids (weekly)	34,000(75,060)	—	—	45 mg/l	—	Daily	24-hour composite
pH	—	—	6.0	—	9.0	Daily	Grab
Residual Chlorine (daily)[2]	—	—	—	—	mg/l	Daily	Grab
Fecal Coliform (monthly)	—	—	—	200/100 ml	—	2 × Weekly	Grab
Fecal Coliform (weekly)	—	—	—	400/100 ml	—	2 × Weekly	Grab
Total Phosphorus (monthly)	755(1,668)	—	—	1.0 ml	—	Daily	24-hour composite
Free Available Chlorine (daily)	—	—	—	—	—	2 × Weekly	Grab

[1] Based on a design flow of 200 MGD.

[2] At such time as effluent limitations for chlorine residual are finally promulgated in the Wisconsin Administrative Code, this permit may be modified to incorporate either the final limitations or interim limitations and a compliance schedule to achieve the final limitations.

All reports required in this section shall be signed by a principal executive officer, a ranking elected official, or other duly authorized representative. These signed reports shall be submitted to:

Wisconsin Department of Natural Resources
WPDES Permits—Municipal Wastewater Section
P. O. Box 7921
Madison, Wisconsin 53707

Overflow Points in the Collection System

1. Limitations on Discharge:

The following overflow points are known to exist in the sewage collection system of the permittee, tributary to the Jones Island Sewage Treatment Plant.

Discharge Serial Number	Location
003	Easement 500 feet S. of Milwaukee-Ozaukee County Line and 200 feet W. of Waverly Road
004	8506 N. Manor Lane
005	W. Roosevelt Drive and W. Seranton Place
006	N. 35th Street and West Congress Street
007	N. 31st Street and W. Fairmount Avenue
008	N. 31st Street Ext'd N. Side of Lincoln Creek
009	N. 27th Street and W. Silver Spring Drive
010	W. Canal Street at S. 8th Street
011	N. 13th Street N. of W. Clybourn Street
012	W. Hampton Avenue and N. Green Bay Road, West
013	W. Hampton Avenue and N. Green Bay Road, East
014	W. Hampton Avenue at N. Lydell Avenue
015	N. Marshall Street and the Milwaukee River
016	W. Vliet Street Ext'd, East of N. 3rd Street
017	N. Van Buren Street at E. Brady Street
018	In S. Water Street at E. Bruce Street
019	S. 1st Street at the Kinnickinnic River
021	W. Layton Avenue at S. 1st Street
023	W. Villard Avenue at N. 27th Street
024	W. Hampton Avenue at N. 32nd Street
026	W. Roosevelt Drive at N. 35th Street
029	W. State Street at N. 46th Street
030	N. Richards Street at E. Congress Street Ext'd

Discharge Serial Number	Location
031	N. Range Line Road at N. Side of the Milwaukee River
032	S. Kinnickinnic Avenue at E. St. Francis Avenue
044	N. Lydell Avenue and W. Lancaster Avenue
045	N. Lydell Avenue at W. Montclair Avenue
046	N. Lake Drive at E. Fairmont Ext'd
048	E. Erie Street and Milwaukee River, East Line
049	E. Erie Street and Milwaukee River, West Line
050	S. Water Street and East Bruce Street
051	Point 350 feet west of N. Humboldt Avenue
052	Point 800 feet west of N. Humboldt Avenue

These overflow points are either to be eliminated effective July 1, 1977, or are required to comply with the following effluent limitations, effective July 1, 1977, and continuing for the term of the permit.

BOD_5	30 mg/l
Suspended Solids	30 mg/l
pH	6 to 9
Fecal Coliform	200/100 ml
Phosphorus	1.0 mg/l

2. Monitoring:

The permittee shall select seven overflow points for installation of flow measurement and sampling equipment. Should a discharge occur from these selected overflow points, the permittee shall continuously measure and sample all flow events.

The permittee shall submit quarterly reports to the Department containing data on the date of discharge, volume of discharge, and sample analysis for each discharge. Each sample shall be analyzed for BOD_5, suspended solids, pH, fecal coliform and any other parameter that the Department may require. The quarterly report shall be due by the 15th day of the month following the calendar quarter. The first report is duly July 15, 1978 for the quarter of April-May-June, 1978.

SLUDGE MANAGEMENT PLAN

1. A sludge management plan shall be developed for the disposal of solids, sludges or other materials resulting from treatment of wastewater. The permittee shall submit the initial sludge management plan by June 30, 1978. If the Department determines that the plan is acceptable it will issue a letter of approval to the permittee.

If the plan as submitted is determined by the Department to be unacceptable, it shall be returned to the permittee for revision and resubmittal.

The permittee shall be responsible for the implementation of the approved sludge management activities. The permittee may at any time amend the sludge management plan, subject to the approval of the Department. The amended plan may not be put into effect until it has received approval from the Department.

The Department shall evaluate the management plans on the basis of recommendations in Wisconsin Department of Natural Resources (DNR) Technical Bulletin #88 and any other pertinent information deemed appropriate to the review of sludge management plans.

The sludge management plan shall be submitted on reporting forms to be provided by this Department. Following review of the management plan, the Department shall issue a letter of approval with any necessary conditions. The letter of approval will establish a means by which the permittee will periodically report to the Department on the sludge disposal practices in the time period between reports. It will also indicate the frequency of sludge analysis required and the parameters to be analyzed in the next reporting period. In general municipalities over 1 MGD will be required to report on a quarterly basis, while municipalities under 1 MGD will be required to report annually. This may be modified depending on the type of waste treated at the municipal facility.

2. The management plan shall be a comprehensive report

which incorporates the following items in sufficient detail to allow evaluation:

a. Storage facilities, when normal disposal sites are unavailable or inaccessible, including:

1) Type of facility

2) Location of facility

3) Capacity of facility

4) Property interest or contractual agreement allowing use of facility, and

5) Any other planned use of the storage facility

b. A description of sludge characteristics, including:

1) Type of wastewater treatment provided that results in sludge generation

2) Type of sludge treatment prior to disposal

3) The quantity of sludge generated for disposal on a daily, monthly and annual basis

4) Physical and chemical characteristics of the sludge including:

Parameter	Abbreviation
*Percent Total Solids	
Total Nitrogen	N
Ammonium Nitrogen	$NH_4 \pm N$
* pH	--
Total Phosphorous	P
Total Potassium	K
Arsenic	As
Cadmium	Cd

Parameter	Abbreviation
Copper	Cu
Chromium	Cr
Lead	Pb
Mercury	Hg
Nickel	Ni
Zinc	Zn

* All parameters other than Percent Solids and pH shall be calculated on a dry weight basis.

c. The mode of sludge transportation, including:

1) The hauler's name and mailing address (license number if a certified hauler).

2) The method of transportation, such as pipe line, barge, truck, train and others.

3) If hauled by a vehicle the following information is needed:

a) Type of vehicle

b) Capacity of vehicle

c) The gross weight of vehicle

d. Information about the ultimate disposal site.

1) If sludge will be disposed of at one or more licensed landfill sites, the following information shall be provided:

a) The amount of sludge to be disposed of at each site

b) The site names and license numbers

c) Contractual agreement

d) An indication of approval from the Solid Waste Management Section of this Department

2) If sludge will be disposed of on land areas (other than at licensed landfill sites), the following information shall be provided for each disposal site.

a) A soil test shall be completed for each disposal site for each year that sludge is to be applied.

b) The location of the site shall be indicated on a soils map. Either a plat map or U.S.G.S. topographic map shall also be provided.

c) A description of the crops to be grown or the dominant vegetation on the disposal site.

d) A discussion of adjacent land use, drainage and land features associated with the disposal site.

e) The ownership of the site

f) A description of the land use agreement

g) A description of methods to be used to spread and incorporate the sludge into the soil.

h) The applicator of the sludge, such as the farmer, land owner, municipality, contractor or others.

i) An estimate of the total acreage to which sludge will be applied.

j) The maximum rate of application (tons/acre/year based on nitrogen or cadmium, whichever is lower) and the loading limit (tons/acre based on metal equivalents or cadmium whichever is lower). If recommended application rates or loading limits are exceeded, comprehensive monitoring may be required.

k) The anticipated use of the site for the 12 months immediately following sludge application.

3) The frequency of sludge disposal and the months in which it will occur.

3. Beginning with submission of the plan, records shall be maintained for each site, (other than at a licensed landfill site), including:

a. The amount of sludge applied (tons/acre).

b. The amount of nitrogen applied per year (lbs./acre).

c. The amount of cadmium applied per year (lbs./acre).

d. The total amount of metal equivalents applied (lbs./acre).

e. The total amount of cadmium applied (lbs./acre).

f. The location of the site on a plat map and the number of acres to which the sludge was applied.

g. The site monitoring results.

h. A description of any adverse environmental, health or social effects that occurred due to sludge disposal.

i. A report of any action not in conformance with the approved plan.

Industrial Discharger Reports

1. Significant Industrial Dischargers

By December 31 of each year, the permittee shall provide this Department with a listing of all the Significant Industrial Dischargers to the treatment system. The first report is due December 31, 1978.

* Note: A Significant Industrial Discharger is defined to be any source which contributes 10,000 gallons or more of process and/or cooling water on any day to the treatment system.

This Department will require each Significant Industrial Discharger to file an annual report as prescribed in Chapter NR 101, Wisconsin Administrative Code. Each discharger must file a report copy with both this Department and the permittee.

2. Pretreatment

The permittee shall submit a report to the WPDES Permit Section, detailing the pretreatment requirements imposed on each industrial user, by June 30, 1978. Annual reports are required each year on June 30. In the event the permittee imposes different pretreatment requirements from those listed in the annual report during the period between report due dates, this Department shall be immediately advised.

PART IV. SPECIAL CONDITIONS

1. Noncompliance Notification

If for any reason the permittee does not comply with or will be unable to comply with any condition specified in this permit or should any unusual or extraordinary discharge of wastes occur from the facilities permitted herein, the permittee shall within five days of noncompliance occurrence notify the Department of Natural Resources, Compliance Section, Box 7921, Madison, Wisconsin 53707, providing the following information:

a. Cause for noncompliance.

b. Expected duration of noncompliance period.

c. Steps taken by permittee to regain compliance with permit conditions.

d. Steps taken to prevent recurrence of the condition of noncompliance.

2. Change in Discharge

The permittee shall notify this Department in advance of:

a. Any facility modification, addition and/or expansion that increases the plant capacity.

b. Any anticipated change in the facility discharge, including any new or changed significant industrial discharges or any significant changes in the quantity or quality of existing industrial discharges as required under Section 147.14, Wisconsin Statutes.

c. Any maintenance of the treatment facility which could result in degradation of effluent quality.

Where necessary, the permit will be modified or reissued to reflect changes in discharge, including any necessary effluent limitations for any pollutants not identified or limited herein.

In no case are any new connections, operational changes, increased flows, or significant changes in influent quality permitted that will cause violation of the effluent limits specified herein.

3. Change of Owner

In the event of transfer of control of operation of a wastewater treatment facility, the prospective owner must file a Statement of Acceptance with this Department. This "Statement" shall indicate that the new owner accepts the terms, conditions and liabilities of the present permit and desires that the existing permit be transferred. At this time the new owner shall also state whether there will be any changes in operation due to transfer of ownership which will cause a change in the discharge.**4. Permit Modification**

After notice and opportunity for a hearing as provided in Section 147.03, Wisconsin Statutes, this permit may be modified, suspended, or revoked in whole or in part during its term for cause including but not limited to, the following:

a. Violation of any terms or conditions of this permit.

b. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts.

c. A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

PART V. GENERAL CONDITIONS

1. Facility Operation and Quality Control

All waste collection, control, treatment and disposal facilities shall be operated in a manner consistent with the following:

a. The municipal wastewater treatment facility must be under the supervision of a state certified operator as required by Chapter 114 of the Wisconsin Administrative Code.

b. At all times, all facilities shall be operated as efficiently as possible and in a manner which will minimize upsets and discharges of excessive pollutants.

2. Adverse Impact

The permittee shall take all reasonable steps to minimize any adverse impact on waters of the State resulting from noncompliance with any effluent limitations specified in this permit, including such special or additional monitoring as may be required by the Department or may be necessary to determine the nature and impact of the noncomplying discharge.

3. Right of Entry

The permittee shall allow authorized representatives of the Department of Natural Resources, and the Administrator of the United States Environmental Protection Agency or his authorized representatives, upon the presentation of credentials:

a. To enter upon the permittee's premises where an effluent source is located or in which any records are required to be kept under the terms and conditions of this permit; and

b. At reasonable times to have access to and copy any records required to be kept under the terms and conditions

of this permit; to inspect any monitoring equipment or monitoring method required in this permit; and to sample any wastewaters.

4. Records Retention

All records and information resulting from the monitoring activities required by this permit, including all records of analyses performed and calibration and maintenance of instrumentation and recordings from continuous monitoring instrumentation shall be retained for a minimum of three (3) years, or longer if requested by the Department of Natural Resources.**5. Recording of Results**

For each measurement or sample taken pursuant to the requirements of this permit, the permittee shall record the following information:

a. The exact place, date, and time of sampling;

b. The dates the analyses were performed;

c. The person(s) who performed the analyses;

d. The analytical techniques or methods used; and

e. The results of all required analyses.

6. Civil and Criminal Liability

Except as provided in permit conditons on "Bypassing" (General Condition 17 & 18) and "Power Failures" (General Conditions 16), nothing in this permit shall be construed to relieve the permittee from civil or criminal penalities or liabilities under Section 147.21, Wisconsin Statutes, Section 311 of the Federal Water Pollution Control Act (33 U.S.C. Section 1321) or any other applicable state law or regulation.

7. Property Rights

The issuance of this permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of federal, state or local laws or regulations.

8. Severability

The provisions of this permit are severable, and if any provision of this permit or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

9. Construction of Onshore or Offshore Structures

This permit does not authorize or approve the construction of any onshore or offshore physical structure of facilities or the undertaking of any work in any navigable waters.

10. Confidential Information

Except for data determined to be confidential under Section 147.08(2)(c), Wisconsin Statutes, all monitoring reports required by this permit shall be available for public inspection at the headquarters of U.S. EPA Region V and the Department of Natural Resources.

11. False Statements and Data

Knowingly making any false statement on any report or other document required by this permit or knowingly rendering any monitoring device or method inaccurate, may result in the imposition of criminal penalities in accordance with the provisons of Section 147.21, Wisconsin Statutes.

12. Prohibited Wastes

Under no circumstances shall the introduction of wastes prohibited by NR 211.10, Wisconsin Administrative Code, be allowed into the waste treatment system. Prohibited wastes include those:

a. Which create a fire or explosion hazard in the treatment works,

b. Which will cause corrosive structural damage to the treatment works,

c. Solid or viscous substances in amounts which cause obstructions to the flow in sewers or interference with the proper operation of the treatment works,

d. Wastewaters at a flow rate or pollutant loading which are excessive over relatively short time periods so as to cause a loss of treatment efficiency, or

e. Changes in discharge volume or composition from contributing industries which overload the treatment works or cause a loss of treatment efficiency.

13. Pretreatment

The permittee shall require any industrial user of the permitted facility to meet pretreatment standards established pursuant to Section 147.07(2), Wisconsin Statutes, and to provide records, reports, and/or information related to compliance with such pretreatment standards.

14. Effluent Limit Modification

Pollutants attributable to Significant Industrial Dischargers may be present in the permittee's discharge. At such time as sufficient information becomes available to establish limitations for such pollutants, and after notice and opportunity for public

hearings as provided in Chapter NR3, Wisconsin Administrative Code, this permit may be revised to specify effluent limitations for any or all of such other pollutants.

15. Toxic Pollutants

Nothing in this permit shall be construed to authorize the discharge of any toxic pollutant or combination of pollutants in amounts or concentrations which exceed any applicable toxic effluent standard or prohibition promulgated under Section 147.07(1). If the promulgated toxic effluent standard or prohibition under Section 147.07(1) for a pollutant present in the discharge is more stringent than any pollutant limitation in this permit, this permit shall be modified or revised in accordance with the toxic effluent standard or prohibition.

16. Power Failures

The permittee is responsible for maintaining adequate safeguards to prevent the discharge of untreated or inadequately treated wastes during electrical power failure either by means of alternate power sources, standby generators or retention of inadequately treated effluent.

17. Unscheduled Bypassing

The unscheduled diversion or unscheduled bypass of any wastewater at the treatment works or collection system is prohibited except (i) an inadvertent bypass resulting from equipment damage or temporary power interruption, or (ii) an unavoidable bypass necessary to prevent loss of life or severe property damage, or (iii) a bypass of excessive storm drainage or runoff which would damage any facilities necessary for compliance with the effluent limitations and prohibitions of this permit. In the event of an unscheduled bypass, the permittee shall immediately notify the Department District Office by telephone of such occurrence. In addition, the permittee shall

notify the Department of Natural Resources, WPDES Permit Section in writing of each such unscheduled diversion or unscheduled bypass by letter within 72 hours.

18. Scheduled Bypassing

Bypassing of wastewater in order to accomplish maintenance or construction activities is prohibited unless specifically authorized in writing by the Department. Under certain conditions, it may be necessary to bypass wastewater in order to accomplish such maintenance or construction activities. When such conditions exist, the permittee shall request permission not less than 60 days prior to the proposed date of scheduled bypassing. The request shall include justification for the bypassing and an evaluation of alternatives for minimizing the volume of the bypass. Based upon the information presented, the Department may deny the request, approve it, or approve it with conditions. If the Department determines that the proposal is of significant public interest, the Department may circulate the request for public comment.

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Anthony S. Earl
Secretary

BOX 7921
MADISON, WISCONSIN 53707

CERTIFIED MAIL **IN REPLY REFER TO: 3420**
RETURN RECEIPT REQUESTED **WI-0024775-2**

Mr. Robert J. Borchardt
Chief Engineer & General Manager
Sewage Commission of the City of Milwaukee
South Shore Wastewater Treatment Plant
P. O. Box 2079
Milwaukee, Wisconsin 53201

RE: WPDES Permit No. WI-0024775-2

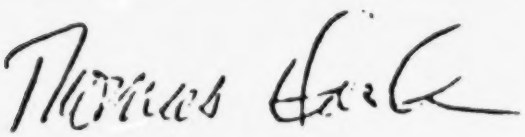
Dear Mr. Borchardt:

Your application WI-0024775-2 for a Wisconsin Pollutant Discharge Elimination System (WPDES) Permit has been processed in accordance with Sections 147.02 and 147.03(3), Wisconsin Statutes.

The enclosed WPDES permit covers the discharges from the facility located at 8500 South Fifth Avenue, Oak Creek, Wisconsin into Lake Michigan and tributary streams in Milwaukee County. All discharges from this facility and actions or reports relating thereto shall be in accordance with the terms and conditions of this permit.

The WPDES permit program has been approved by the Administrator of the U.S. Environmental Protection Agency pursuant to Section 402(b) of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. Section 1342(b)). The terms and conditions of this permit are accordingly subject to enforcement under Sections 147.21 and 147.29, Wisconsin Statutes and Section 309 of the Federal Act (33 U.S.C. Section 1319).

The Judgment entered on May 25, 1977 in the matter of *The Sewerage Commission of the City of Milwaukee, et al* vs. *Wisconsin Department of Natural Resources* (Case No. 152-342, Dane County Circuit Court, State of Wisconsin), and the Judgment entered on November 15, 1977 in the matter of *People of Illinois* vs. *City of Milwaukee, et al* (Case No. 72-C-1253; U.S.D.C. N. Dt. (Case No. 72-C-1253; U.S.D.C. N.Dt. of Ill.) of Ill.) impose legal obligations and requirements on the permittee which are independent of the terms of this permit and in no way affected by the issuance of this permit.



Thomas Kroehn
Administrator
Division of Environmental Standards

Dated February 28, 1978
Enclosures
Permit

cc: Environmental Protection Agency
ATTN: Permits Branch
Southeast District

PERMIT TO DISCHARGE UNDER THE WISCONSIN POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of Chapter 147, Wisconsin Statutes, SEWAGE COMMISSION OF THE CITY OF MILWAUKEE SOUTH SHORE is permitted to discharge from a wastewater treatment facility located at

8500 SOUTH FIFTH AVENUE
OAK CREEK, WISCONSIN

to LAKE MICHIGAN AND TRIBUTARY STREAMS IN MILWAUKEE COUNTY in accordance with the effluent limitations, monitoring requirements and other conditions set forth in this permit.

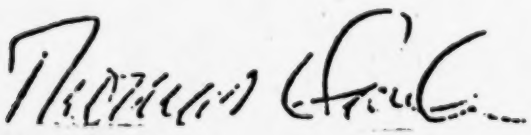
All discharges authorized herein shall be consistent with the terms and conditions of this permit. The discharge of any pollutant identified in this permit more frequently than or at a level in excess of that authorized shall constitute a violation of the permit.

This permit shall become effective on the date of signature.

This permit to discharge shall expire at midnight, June 30, 1982.

The permittee shall not discharge after the date of expiration. If the permittee wishes to continue to discharge after this expiration date an application shall be filed for reissuance of this permit in accordance with the requirements of Chapter NR 200, Wisconsin Administrative Code, at least 180 days prior to this expiration date.

State of Wisconsin Department of Natural Resources For the Secretary

By 

Thomas A. Kroehn
Administrator
Division of Environmental Standards

Dated this 28 day of Feb., 1978

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PART I. MONITORING REQUIREMENTS

1. Reporting

a. Monitoring results obtained during the previous month shall be summarized and reported on a WPDES Self-Monitoring Report Form, #3200-28, postmarked no later than the 15th day of the month following the completed reporting period. The first report for the month of March 1978 is due on or before April 15, 1978. The white and green copies of 3200-28 shall be submitted to:

Wisconsin Department of Natural Resources
Environmental Protection Section-Permits
Southeast District
P. O. Box 13248
Milwaukee, Wisconsin 53226

The pink report copy is to be retained by the permittee.

b. Monitoring reports shall be signed by a principal executive officer, a ranking elected official, or other duly authorized representative.

c. If the permittee monitors any pollutant more frequently than required by this permit, the results of such monitoring shall be included on form #3200-28.

d. Sampling and laboratory testing procedures shall be performed in accordance with Chapters NR 218 and NR 219 of the Wisconsin Administrative Code.

A. INFLUENT MONITORING REQUIREMENTS

During the period beginning on the effective date of this permit and lasting until June 30, 1982 the permittee is required to perform the following monitoring.

Samples taken in compliance with the monitoring requirements specified below shall be taken at a point upstream from the introduction of any recycled flows.

Parameter	Units	Monitoring Requirements: Sample Frequency	Monitoring Requirements: Sample Type
Flow[1]	MGD		Continuous
BOD_5-day	mg/1	Daily	24-hour composite
Suspended Solids	mg/1	Daily	24-hour composite
Phosphorus	mg/1	Daily	24-hour composite

[1] Flow measurement of the wastewater volume received at the treatment plant, including any bypassed flow, shall be monitored continuously.

B. EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

During the period beginning on the effective date of this permit and lasting until June 30, 1982 the permittee is authorized to discharge from outfall serial number 002.

Samples taken in compliance with the monitoring requirements specified below shall be taken at a point following the disinfection process.

	Effluent Limitations: Quantity-kg/day (lbs/day)			Other Limitations (Specify Units)		Monitoring Requirements	
Effluent Parameters	Average 1	Maximum	Minimum	Average	Maximum	Sample Frequency	Sample Type
BOD_5 (monthly)	13,600(30,000)	–	–	30 mg/1	–	Daily	24-hour composite
BOD_5 (weekly)	20,400(45,000)	–	–	45 mg/1	–	Daily	24-hour composite
Suspended Solids (monthly)	13,600(30,000)	–	–	30 mg/1	–	Daily	24-hour composite
Suspended Solids (weekly)	20,400(45,000)	–	–	45 mg/1	–	Daily	24-hour composite
pH	–	–	6.0	–	9.0	Daily	Grab
Residual Chlorine (daily)[2]	–	–	–	–	mg/1	Daily	Grab
Fecal Coliform (monthly)	–	–	–	200/100 ml	–	2x Weekly	Grab
Fecal Coliform (weekly)	–	–	–	400/100 ml	–	2x Weekly	Grab
Total Phosphorus (monthly)	453(1000)	–	–	1.0 mg/1	–	Daily	24-hour composite
Free Available Chlorine (daily)	–	–	–	–	–	2x Weekly	Grab

[1] Based on a design flow of 120 MGD

[2] At such times as effluent limitations for chlorine residual are finally promulgated in the Wisconsin Administrative Code, this permit may be modified to incorporate either the final limitations or interim limitations and a compliance schedule to achieve the final limitations

PART II. SPECIAL REPORTS

All reports required in this section shall be signed by a principal executive officer, a ranking elected official, or other duly authorized representative. These signed reports shall be submitted to:

Wisconsin Department of Natural Resources
WPDES Permits—Municipal Wastewater Section
P.O. Box 7921
Madison, Wisconsin 53707

Overflow Points in the Collection System

1. Limitations on discharge.

The following overflow points are known to exist in the sewage collection system of the permittee, tributary to the South Shore sewage treatment plant.

Discharge Serial Number	Location
020	S. Howell Avenue at E. Grange Avenue
025	S. 35th Street at W. Manitoba Street
027	W. Hampton Avenue at N. 63rd Street Ext'd
028	S. 84th Street at W. Adler Street Ext'd
033	W. Fisher Parkway at N. 106th Street
034	Honey Creek Parkway at W. Portland Avenue
035	Honey Creek Parkway at W. Wisconsin Avenue
037	Menomonee River Parkway, 300 feet E. of N. 68th Street
038	N. Martha Washington Drive, 450 feet S. of W. Vleit Street
039	N. 62nd Street, 258 feet South of W. Martin Drive
040	N. 62nd Street and W. Martin Drive
041	S. 60th Street of S. side of the Kinnickinnic River
042	S. 79th Street Ext'd at W. Dickinson Street Ext'd
043	W. Lincoln Avenue at 565 Feet W. of S. 43rd Street
047	W. Oklahoma Avenue, 100 feet W. of S. 74th Street
054	S. 117th Street and W. Greenfield Avenue

These overflow points are either to be eliminated effective July 1, 1977 or are required to comply with the following effluent limitations, effective July 1, 1977, and continuing for the term of the permit.

BOD_5	—30 mg/l
Suspended Solids	—30 mg/l
pH	—6-9 s.u.
Fecal Coliform	—200/100 ml
Phosphorus	—1.0 mg/l

2. Monitoring

The permittee shall select three overflow points for installation of flow measurement and sampling equipment.

Should a discharge occur from these selected overflow points, the permittee shall continuously measure and sample all flow events. The permittee shall submit quarterly reports to the Department containing data on the date of discharge, volume of discharge, and sample analysis for each discharge.

Each sample shall be analyzed for BOD_5, suspended solids, pH, fecal coliform and any other parameter that the Department may require. The quarterly report shall be due by the 15th day of the month following the calendar quarter. The first report is due July 15, 1978 for the quarter April, May and June, 1978.

Emergency Bypass—Serial Number 053

The emergency bypass shall intercept wastewater at two points: 1) at the plant influent sewer preceding the existing coarse screens where the intercepted wastewater will be conveyed for discharge to Lake Michigan at a point approximately south of the existing main administration building, and 2) at the effluent side of the primary settling basins where the intercepted wastewater will be conveyed for discharge to Lake Michigan through the existing plant outfall sewer.

The emergency bypass shall only be used in accordance with the following conditions:

1. All wastewater up to and including an instantaneous peak rate of 320 MGD shall have a minimum of primary settling. Rates in excess of 240 MGD may be bypassed following the primary settling basins and preceding the aeration basins.

2. All wastewater exceeding an instantaneous peak rate of 320 MGD may be bypassed preceding the existing coarse screens.

3. Plans and specifications for the diversion structure and the conveyance piping shall be submitted to the Department of Natural Resources and approval obtained prior to the initiation of construction.

4. If a diversion structure is constructed preceding the existing coarse screens, such structure shall incorporate a means of coarse screening all diverted wastewater.

5. All wastewater diverted at the existing coarse screens of following primary clarification shall be disinfected to produce a fecal coliform count of less than 1000/100 ml utilizing the MPM analytical technique. Adequate detention time shall be provided to accomplish the required standard. The District shall submit, with the plans and specifications, justification for the proposed detention time.

6. The District shall notify all water treatment plants drawing raw water from Lake Michigan within a distance of 10 miles of the South Shore Treatment Plant of any impending bypass.

7. The District shall by June 30, 1978 submit to the Department a report on the adequacies of the existing plant outfall sewer to handle peak flow rates expected to be received at the plant. If the existing outfall sewer is determined to be inadequate, a plan for increasing its capacity shall be included in the report.

8. The wastewater bypassed at the existing coarse screens and/or following primary settling shall be monitored for volume, BOD_5, suspended solids, pH and fecal coliform. The sample of BOD_5 and suspended solids shall

be a composite sample over the period of bypass. The sample for pH and fecal coliform shall be a grab sample during the period of bypass.

9. All bypass events and monitoring thereof shall be reported to the Department on a monthly basis as an addendum to the monthly self-monitoring reports.

SLUDGE MANAGEMENT PLAN

1. A sludge management plan shall be developed for the disposal of solids, sludges or other materials resulting from treatment of wastewater. The permittee shall submit the initial sludge management plan by June 30, 1978. If the Department determines that the plan is acceptable it will issue a letter of approval to the permittee.

If the plan as submitted is determined by the Department to be unacceptable, it shall be returned to the permittee for revision and resubmittal.

The permittee shall be responsible for the implementation of the approved sludge management activities. The permittee may at any time amend the sludge management plan, subject to the approval of the Department. The amended plan may not be put into effect until it has received approval from the Department.

The Department shall evaluate the management plans on the basis of recommendations in Wisconsin Department of Natural Resources (DNR) Technical Bulletin #88 and any other pertinent information deemed appropriate to the review of sludge management plans.

The sludge management plan shall be submitted on reporting forms to be provided by this Department. Following review of the management plan, the Department shall issue a letter of approval with any necessary conditions. The letter of approval will establish a means by which the permittee will periodically report to the Department on the sludge disposal practices in the time period between reports. It will also indicate the frequency of sludge analysis required and the parameters to be analyzed in the next reporting period. In general municipalities over 1 MGD will be required to report on a quarterly basis, while municipalities under 1 MGD will be required to report annually. This may be modified depending on the type of waste treated at the municipal facility.

2. The management plan shall be a comprehensive report which incorporates the following items in sufficient detail to allow evaluation:

a. Storage facilities, when normal disposal sites are unavailable or inaccessible, including:

1) Type of facility

2) Location of facility

3) Capacity of facility

4) Property interest or contractual agreement allowing use of facility, and

5) Any other planned use of the storage facility

b. A description of sludge characteristics, including:

1) Type of wastewater treatment provided that results in sludge generation

2) Type of sludge treatment prior to disposal

3) The quantity of sludge generated for disposal on a daily, monthly and annual basis

4) Physical and chemical characteristics of the sludge including:

Parameter	Abbreviation
*Percent Total Solids	
Total Nitrogen	N
Ammonium Nitrogen	$NH_4 \pm N$
* pH	- -
Total Phosphorous	P
Total Potassium	K
Arsenic	As
Cadmium	Cd

Parameter	Abbreviation
Copper	Cu
Chromium	Cr
Lead	Pb
Mercury	Hg
Nickel	Ni
Zinc	Zn

* All parameters other than Percent Solids and pH shall be calculated on a dry weight basis.

c. The mode of sludge transportation, including:

1) The hauler's name and mailing address (license number if a certified hauler).

2) The method of transportation, such as pipe line, barge, truck, train and others.

3) If hauled by a vehicle the following information is needed:

a) Type of vehicle

b) Capacity of vehicle

c) The gross weight of vehicle

d. Information about the ultimate disposal site.

1) If sludge will be disposed of at one or more licensed landfill sites, the following information shall be provided:

a) The amount of sludge to be disposed of at each site

b) The site names and license numbers

c) Contractual agreements

d) An indication of approval from the Solid Waste Management Section of this Department

2) If sludge will be disposed of on land areas (other than at licensed landfill sites), the following information shall be provided for each diposal site.

a) A soil test shall be completed for each disposal site for each year that sludge is to be applied.

b) The location of the site shall be indicated on a soils map. Either a plat map or U.S.G.S. topographic map shall also be provided.

c) A description of the crops to be grown or the dominant vegetation on the disposal site.

d) A discussion of adjacent land use, drainage and land features associated with the disposal site.

e) The ownership of the site

f) A description of the land use agreement

g) A description of methods to be used to spread and incorporate the sludge into the soil.

h) The applicator of the sludge, such as the farmer, land owner, municipality, contractor or others.

i) An estimate of the total acreage to which sludge will be applied.

j) The maximum rate of application (tons/acre/year based on nitrogen or cadmium, whichever is lower) and the loading limit (tons/acre based on metal equivalents or cadium whichever is lower). If recommended application rates or loading limits are exceeded, comprehensive monitoring may be required.

k) The anticipated use of the site for the 12 months immediately following sludge application.

3) The frequency of sludge disposal and the months in which it will occur.

3. Beginning with submission of the plan, records shall be maintained for each site (other than at a licensed landfill site), including:

a. The amount of sludge applied (tons/acre).

b. The amount of nitrogen applied per year (lbs./ acre).

c. The amount of cadmium applied per year (lbs./ acre).

d. The total amount of metal equivalents applied (lbs./ acre).

e. The total amount of cadmium applied (lbs./acre).

f. The location of the site on a plat map and the number of acres to which the sludge was applied.

g. The site monitoring results.

h. A description of any adverse environmental, health or social effects that occurred due to sludge disposal.

i. A report of any action not in conformance with the approved plan.

Industrial Discharger Reports

1. Significant Industrial Dischargers

By December 31 of each year, the permittee shall provide this Department with a listing of all the Significant Industrial Dischargers to the treatment system. The first report is due December 31, 1978.

*Note: A Significant Industrial Discharger is defined to be any source which contributes 10,000 gallons or more of process and/or cooling water on any day to the treatment system.

This Department will require each Significant Industrial Discharger to file an annual report as prescribed in Chapter NR 101, Wisconsin Administrative Code. Each discharger must file a report copy with both this Department and the permittee.

2. Pretreatment

The permittee shall submit a report to the WPDES Permit Section, detailing the pretreatment requirements imposed on each industrial user, by June 30, 1978. Annual reports are required each year on June 30. In the event the permittee imposes different pretreatment requirements from those listed in the annual report during the period between report due dates, this Department shall be immediately advised.

PART III SCHEDULE OF COMPLIANCE

A. The South Shore Wastewater Treatment Facility will by January 31, 1978 begin accepting all wastewater flows from the Village of Butler. The Milwaukee Met will notify the Department of Natural Resources, within seven days of the date of entire flow diversion to its treatment facility.

PART IV. SPECIAL CONDITIONS

1. Noncompliance Notification

If for any reason the permittee does not comply with or will be unable to comply with any condition specified in this permit or should any unusual or extraordinary discharge of wastes occur from the facilities permitted herein, the permittee shall within five days of noncompliance occurrence notify the Department of Natural Resources, Compliance Section, Box 7921, Madison, Wisconsin 53707, providing the following information:

a. Cause for noncompliance.

b. Expected duration of noncompliance period.

c. Steps taken by permittee to regain compliance with permit conditions.

d. Steps taken to prevent recurrence of the condition of noncompliance.

2. Change in Discharge

The permittee shall notify this Department in advance of:

a. Any facility modification, addition and/or expansion that increases the plant capacity.

b. Any anticipated change in the facility discharge, including any new or changed significant industrial discharges or any significant changes in the quantity or quality of existing industrial discharges as required under Section 147.14, Wisconsin Statutes.

c. Any maintenance of the treatment facility which could result in degradation of effluent quality.

Where necessary, the permit will be modified or reissued to reflect changes in discharge, including any necessary limitations for any pollutants not identified or limited herein. In no case

are any new connections, operational changes, increased flows, or significant changes in influent quality permitted that will cause violation of the effluent limits specified herein.

3. Change of Owner

In the event of transfer of control of operation of a wastewater treatment facility, the prospective owner must file a Statement of Acceptance with this Department. This "Statement" shall indicate that the new owner accepts the terms, conditions and liabilities of the present permit and desires that the existing permit be transferred. At this time the new owner shall also state whether there will be any changes in operation due to transfer of ownership which will cause a change in the discharge.

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After notice and opportunity for a hearing as provided in Section 147.03, Wisconsin Statutes, this permit may be modified, suspended, or revoked in whole or in part during its term for cause including, but not limited to, the following:

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a. The municipal wastewater treatment facility must be under the supervision of a state certified operator as required by Chapter 114 of the Wisconsin Administration Code.

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The permittee shall take all reasonable steps to minimize any adverse impact on waters of the state resulting from noncompliance with any effluent limitations specified in this permit, including such special or additional monitoring as may be required by the Department or may be necessary to determine the nature and impact of the noncomplying discharge.

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The permittee shall allow authorized representatives of the Department of Natural Resources, and the Administrator of the United States Environmental Protection Agency or his authorized representatives, upon the presentation of credentials:

a. To enter upon the permittee's premises where an effluent source is located or in which any records are required to be kept under the terms and conditions of this permit; and

b. At reasonable times to have access to and copy any records required to be kept under the terms and conditions

of this permit; to inspect any monitoring equipment or monitoring method required in this permit; and to sample any wastewaters.

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For each measurement or sample taken pursuant to the requirements of this permit, the permittee shall record the following information:

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b. The dates the analyses were performed;

c. The person(s) who performed the analyses;

d. The analytical techniques or methods used; and

e. The results of all required analyses.

6. Civil and Criminal Liability

Except as provided in permit conditions on "Bypassing" (General Condition 17 & 18) and "Power Failures" (General Conditions 16), nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties or liabilities under Section 147.21, Wisconsin Statutes, Section 311 of the Federal Water Pollution Control Act (33 U.S.C. Section 1321) or any other applicable state law or regulation.

7. Property Rights

The issuance of this permit does not convey any property rights in either real or personal property, or any exclusive

privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of federal, state or local laws or regulations.

8. Severability

The provisions of this permit are severable, and if any provision of this permit or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

9. Construction of Onshore or Offshore Structures

This permit does not authorize or approve the construction of any onshore or offshore physical structure of facilities or the undertaking of any work in any navigable waters.

10. Confidential Information

Except for data determined to be confidential under Section 147.08(2)(c), Wisconsin Statutes, all monitoring reports required by this permit shall be available for public inspection at the headquarters of U.S. EPA Region V and the Department of Natural Resources.

11. False Statements and Data

Knowingly making any false statement on any report or other document required by this permit or knowingly rendering any monitoring device or method inaccurate, may result in the imposition of criminal penalties in accordance with the provisions of Section 147.21, Wisconsin Statutes.

12. Prohibited Wastes

Under no circumstances shall the introduction of wastes prohibited by NR 211.10, Wisconsin Administrative Code, be allowed into the waste treatment system. Prohibited wastes include those:

a. Which create a fire or explosion hazard in the treatment works,

b. Which will cause corrosive structural damage to the treatment works,

c. Solid or viscous substances in amounts which cause obstructions to the flow in sewers or interference with the proper operation of the treatment works,

d. Wastewaters at a flow rate or pollutant loading which are excessive over relatively short time periods so as to cause a loss of treatment efficiency, or

e. Changes in discharge volume or composition from contributing industries which overload the treatment works or cause a loss of treatment efficiency.

13. Pretreatment

The permittee shall require any industrial user of the permitted facility to meet pretreatment standards established pursuant to Section 147.07(2), Wisconsin Statutes, and to provide records, reports, and/or information related to compliance with such pretreatment standards.

14. Effluent Limit Modification

Pollutants attributable to Significant Industrial Dischargers may be present in the permittee's discharge. At such time as sufficient information becomes available to establish limitations for such pollutants, and after notice and opportunity for public hearings as provided in Chapter NR 3, Wisconsin Administrative Code, this permit may be revised to specify effluent limitations for any or all of such other pollutants.

15. Toxic Pollutants

Nothing in this permit shall be construed to authorize the discharge of any toxic pollutant or combination of pollutants in amounts or concentrations which exceed any applicable toxic

effluent standard or prohibition promulgated under Section 147.07(1). If the promulgated toxic effluent standard or prohibition under Section 147.07(1) for a pollutant present in the discharge is more stringent than any pollutant limitation in this permit, this permit shall be modified or revised in accordance with the toxic effluent standard or prohibition.

16. Power Failures

The permittee is responsible for maintaining adequate safeguards to prevent the discharge of untreated or inadequately treated wastes during electrical power failure either by means of alternate power sources, standby generators or retention of inadequately treated effluent. **17. Unscheduled Bypassing**

The unscheduled diversion or unscheduled bypass of any wastewater at the treatment works or collection system is prohibited except (i) an inadvertent bypass resulting from equipment damage or temporary power interruption, or (ii) an unavoidable bypass necessary to prevent loss of life or severe property damage, or (iii) a bypass of excessive storm drainage or runoff which would damage any facilities necessary for compliance with the effluent limitations and prohibitions of this permit. In the event of an unscheduled bypass, the permittee shall immediately notify the Department District Office by telephone of such occurrence. In addition, the permittee shall notify the Department of Natural Resources, WPDES Permit Section in writing of each such unscheduled diversion or unscheduled bypass by letter within 72 hours.

18. Scheduled Bypassing

Bypassing of wastewater in order to accomplish maintenance or construction activities is prohibited unless specifically authorized in writing by the Department. Under certain

conditions, it may be necessary to bypass wastewater in order to accomplish such maintenance or construction activities. When such conditions exist, the permittee shall request permission not less than 60 days prior to the proposed date of scheduled bypassing. The request shall include justification for the bypassing and an evaluation of alternatives for minimizing the volume of the bypass. Based upon the information presented, the Department may deny the request, approve it, or approve it with conditions. If the Department determines that the proposal is of significant public interest, the Department may circulate the request for public comment.

Amendment Proposed By Congressman Les Aspin After The July, 1977 Decision By The District Court But Prior To Entry Of The Judgment Order And Prior To Congressional Passage Of The 1977 Amendments.

Sec. (a) Section 402 of the Federal Water Pollution Control Act is amended by adding at the end thereof the following new subsection:

> "(1) In any case where a State whose waters may be affected by the issuance of a permit under this section fails to submit any recommendations to the permitting State as authorized in subsection (b) (5) of this section, the State failing to make such a submission (and its persons) shall not have standing to bring any action to abate (in whole or in part) as a nuisance under common law in any court of the United States any discharge which would have been the subject of such recommendations."

(b) The amendment made by subsection (a) of this section shall be applicable to any action brought to abate (in whole or in part) as a nuisance under common law in any court of the United States any discharge of pollutants, unless a final decision has been rendered prior to the effective date of this amendment.

E. STEVENSON
ILLINOIS

United States Senate
WASHINGTON, D.C. 20510

October 10, 1977

The Honorable Jennings Randolph
United States Senate
Washington, D.C. 20510

Dear Jennings:

I understand that Congressman Les Aspin plans to urge the joint conference committee on H.R. 3199, the Water Pollution Control Act Amendments of 1977, to adopt language that would attempt to limit the right of a plaintiff to bring suit under the common law of nuisance and would instead require him to seek a remedy under the Water Pollution Control Act of 1972 and to exhaust all administrative remedies under the Act before bringing suit.

You may know that a Federal district court recently found in favor of the State of Illinois as plaintiff in a suit to require the City of Milwaukee to stop its pollution of Lake Michigan. Negotiations on a compliance schedule for Milwaukee are now under way, and a final judgment may be rendered within the next several weeks.

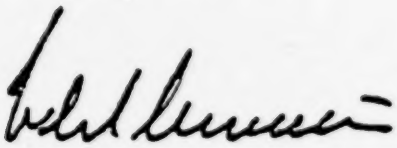
It is unlikely that the Aspin amendment would alter the outcome of that case, which was decided on both the Federal and the State common law of nuisance and on Illinois' environmental protection statute. However, it could well lead to further lengthy litigation in a case already subjected to prolonged litigation. Moreover, it would preclude similar suits by other plaintiffs in the future. Many of them would then be forced to rely solely on the Federal statute, entailing long administrative proceedings before U.S. E.P.A.

I believe that it would be unwise to bar common law suits and to limit standards to those established by that agency when local conditions may justify higher standards and speedier action.

I urge the Senate conferees not only to oppose the Aspin amendment as without merit but also as outside the scope of the conference.

With best wishes,

Sincerely,



Department of Justice
Washington

October 18, 1977

Honorable Edmund S. Muskie
United States Senate
Washington, D.C. 20510

Dear Senator Muskie:

It has come to our attention that a proposal has been made to the conferees on the amendments to the Federal Water Pollution Control Act to adopt an amendment which seeks to overturn a decision of the federal district court for the Northern District of Illinois. This case was decided recently and involved a common law nuisance action between the State of Illinois and the City of Milwaukee. The court determined that damage from pollution was occurring which violated the standards of the common law; among other things, the judge found clear and convincing evidence that the present "discharge of sewage by the defendants into Lake Michigan constitutes a health hazard of serious magnitude to the residents of the State of Illinois." As a result the court ordered a remedy with respect to the municipal sewage treatment system of the City of Milwaukee. Milwaukee is, of course, entitled to appeal this decision to the court of appeals.

We are writing to oppose the amendment under which the Federal Water Pollution Control Act would overturn any common law determination by a federal court, either specifically or generally.

We do this for several reasons. First, Congress and the federal agencies which administer the pollution statutes must of

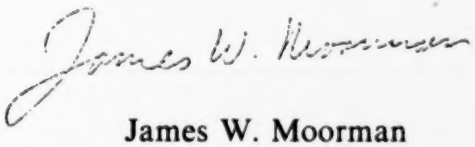
necessity, address themselves to general standards and broad enforcement programs. In the vast majority of cases such a statutory and administrative program will protect citizens from the harm and damage of pollution. But realistically neither the legislature nor EPA can expect to foresee all instances of harm; gaps will occur in the law. The common law serves to give an injured party who may have been neglected by the statute or by an overburdened enforcing agency a form of redress. There is no good argument for removing this opportunity for remedy. The basic principle of the common law of public nuisance is that one is liable for damages caused to another where the benefit of one's action does not outweigh the harm. This is a sound principle. Where it can be shown that pollution has injured someone it should not be a sufficient defense to claim that the generalized standards of a statute have been complied with. Polluters should properly be held to a standard that holds them liable for unnecessarily injuring others and not simply for violating the statutory law. The number of cases under the common law will inevitably be small but where they are meritorious there is no basis for abolishing this cause of action.

Second, the decision in the *Milwaukee* case follows a careful factual inquiry into the matter by the judge and the parties. Unless the basic rationale underlying a decision violates the policies which Congress seeks to follow—and the protection of the public health and the chemical and biological integrity of Lake Michigan are surely not contrary to Congress' wishes—it is unwise for Congress to act as a court of appeals or to pass generalized legislation which sweeps beyond the confines of the particular problem before it. If the true problem here is the financial burden to Milwaukee that problem should be solved directly, perhaps through financial aid, rather than transforming the issue to one of common law remedies and then mistakenly attacking that "problem." This smacks too much of killing the messenger who brings bad news.

We believe we should make these views available to you in considering this most important matter. The relationship of statutory law with common law is a very important one, and our concern is that we not deprive our citizens from access to courts to seek common law remedies when those are appropriate. Total reliance on statutory and administrative agency relief, we do not feel will ever be, nor should it ever be, the exclusive mechanism by which remedies are afforded in our society in any areas where damage or harm or threat of such occurs.

I am supplying copies of this letter to the other conferees on the bill.

Sincerely,



James W. Moorman
Assistant Attorney General
Land and Natural Resources Division

ILLINOIS LAWSUIT--SUMMARY OF MANDAMUS OR PRETRIAL APPEAL AVENUES FROM DISTRICT COURT DENIAL OF OUR MOTIONS TO THE SEVENTH CIRCUIT COURT OF APPEALS

By: Robert A. Melin and Ewald L. Moerke, Jr.

I. It is important to stress at the outset that the practical chance of obtaining any form of pretrial appellate relief even simply in terms of additional trial delay is extremely slim. Nonetheless, if we can afford to devote the necessary manpower, an aggressive appellate program combined with a further motion program before the District Court may spread more thinly the time our opposition lawyers can devote to trial preparation and wear down their energies in this matter a bit.

II. Motions to Dismiss--Mandamus or Pretrial Appeal

A. Pretrial—Appeal. The District Court has refused to certify these issues. There seems little practical possibility in any attempt at pretrial appeal.

B. Mandamus. We should pursue mandamus with respect to our pre-emption and possibly also our primary jurisdiction contention arguing that it is needed to remedy an erroneous assumption of jurisdiction by the District Court. We can make a good argument, I think, that the alleged erroneous assumption of jurisdiction is not based upon a question of fact or a mixed question of law and fact. We have a strong contention that the want of jurisdiction is clear as a matter of law appearing affirmatively on the face of the record and in the United States statutes and administrative regulations. When the want of jurisdiction appears affirmatively on the face of the record or is otherwise clear as a matter of law, the writ of mandamus will issue to remedy an unauthorized assumption of jurisdiction by the lower court. In Re

Winn, 313 U.S. 458, 53 L.Ed. 873, 29 S. Ct. 515; General Tire & Rubber Co. v. Watkins (C. A. 4), 326 F. 2d 926, cert. den., 377 U.S. 909, 12 L.Ed. 2d 179, 84 S. Ct. 1166; Re NLRB, 304 U.S. 486, 82 L.Ed. 1482, 58 S. Ct. 1001; Delaware L. & W.R. Co. v. Rellstab, 276 U.S. 1, 72 L.Ed. 439, 48 S. Ct. 203; Re Skinner & E. Corp., 265 U.S. 86, 68 L.Ed. 912, 44 S. Ct. 446; Re Metropolitan Trust Co., 218 U.S. 312, 54 L.Ed. 1051, 31 S. Ct. 18.

We should argue that there is a tremendous public interest here which favors the granting of the writ of mandamus at this time. We should point out that the taxpayers of Milwaukee County and the City stand the risk of impossibly burdensome tax bills and that the program suggested by the plaintiff will impose an impossible burden upon the community, etc. There is case law to the effect that the public interest may be the actuating reason for granting the writ of mandamus and that the Court may, in view of serious public consequences which would occur if the writ were denied, grant the writ even though the petitioner may not have a clear legal right thereto. Ex rel Settles v. Board of Education (Okla.) 389 P. 2d 356.

III. Indispensable Parties--Intervention and Motions for Joinder

A. Where a party is truly indispensable such that intervention is a matter of right, an order denying intervention is directly appealable by the party unsuccessfully seeking intervention. This is the preferred pretrial remedy for situations where a third party's rights will with certainty be affected by any judgment forthcoming in the action. Burger Chef Systems, Inc. v. Burger Chef of Mich., Inc., (C. A. Mich., 1964) 334 F. 2d 926; Swift v. Black Panther Oil & Gas Co.

(1917), 244 F. 20, 156 C.C.A. 448; Illinois Steel Co. v. Ramsey (1910), 176 F. 853, 100 C.C.A. 323; Credits Commutation Co. v. U.S. (1898), 91 F. 570, affirmed, 20 S. Ct. 636, 177 U.S. 311; McKee v. Brazell (1922), 284 F. 554; New York Public Interest Research Group, Inc. v. Regents of University of State of N.Y. (1975), 516 F. 2d 350; Martin v. Calvar Corp. (1969), 411 F. 2d 552; Huesse v. Camp (1967), 385 F. 2d 694. Thus, the State of Wisconsin, if it sought to intervene reasonably prior to trial and if said intervention was denied, might well have a valid appeal and could perhaps have a shot at restraining trial of the case until the decision on the appeal.

B. Joinder of Indispensable Parties. Perhaps because third parties whose rights will necessarily be affected may intervene and, if denied intervention, procure immediate prejudgment appeal therefrom, orders denying motions for joinder of indispensable parties almost universely (sic) are held to be interlocutory orders from which prejudgment appeal will not lie absent certification by the District Judge. In our case, of course, the District Judge has not as yet ruled on our motion to certify his denial of our indispensable party joinder motion. Perhaps, we will wish to ask him to rule upon this question. Quite universely (sic) also, mandamus is held unavailable as a party seeking joinder is viewed as having an adequate remedy upon appeal from the final judgment. Remedy afforded after judgment, quite in accord with Rule 19(b), FRCP, is simply modification of the judgment of the lower court so as to preclude it from affecting the rights of third parties. (Perhaps by striking out provisions applicable to third parties).

While we would be bucking our heads into rather well-established case law, we could give our opposition some increased work load by appealing immedi-

ately from the denial of our joinder motion on the basis of the following theory. We could argue that the Order denying our joinder motion is a final decision within the meaning of Title 28 of Section 1291, U.S. Code, inasmuch as without joining the other polluters with pollutional discharge inseparable from our own (for example, others discharging into the Milwaukee River) it is utterly impossible for a court to frame any meaningful final judgment favorable to the plaintiffs. This is, in effect, the definition of "final agency action" adopted in Pepsico, Inc. v. F.T.C. (1972), 472 F. 2d 179. The Pepsico decision was written by Chief Judge Friendly who is apparently a judge of some repute. These are certain problems with the decision which we would have to argue around. In the first place the Pepsico court was endeavoring to define a "final agency action" rather than a "final decision". In other words, Pepsico involved an attempted appeal of an agency proceeding pursuant to Title 5, U.S.C., Section 704 prior to termination of that proceeding rather than an attempt to procure a prejudgment appeal from an Order of a lower court pursuant to Title 28, U.S.C., Section 1291.

The Pepsico court is, itself, impressed with the distinction:

> "If the APA uses the term 'final agency action' in the same sense that the Judicial Code speaks of a 'final decision' of a lower court, 28 U.S.C. Section 1291, there could be little doubt about the answer. It is clear that 'denial of a motion to dismiss is not a final order and is therefore not appealable,' . . ." Pepsico, Inc., supra, at p. 185.

Nonetheless, the similarity between Title 5, U.S.C., Section 704 and Title 28, Section 1291 is impressive:

> "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." Title 5, U.S.C., Section 704.

There is a second problem from our point of view with the Pepsico decision which is brought out by the following comments of the court:

> "We are unable to conclude, however, that appellants have brought themselves within the possibly over-generous principle with respect to reviewability that we have put forward." Pepsico, supra, at p. 187.

> "We thus conclude that even under the perhaps unduly liberal assumption that review would now lie if the proceeding as presently structured could not result in a valid cease and desist order, . . ." Pepsico, supra, at p. 191.

Thus, the Pepsico Court, itself, held it was adopting a liberal definition of "final agency action for which there is no other adequate remedy in a court".

The Pepsico Court defined "final agency action for which there is no other adequate remedy in a court" in the following manner:

> "a principle that one can find 'final agency action for which there is not other adequate remedy in a court' if an agency refuses to dismiss a proceeding that is plainly beyond its jurisdiction as a matter of law or is being conducted in a manner that cannot result in a valid order." (Emphasis added) Pepsico, supra, at p. 187.

We can certainly appeal the denial of our motions for joinder of indispensable parties (at least the other polluters) and should be able to show cause why the appeal should not be dismissed for reasons that the denial order was interlocutory, by arguing the similarity between Title 5, Section 704 terminology and Title 28, Section 1291 terminology. It would seem possible to frame a most respectable argument inasmuch as it really appears silly to proceed with the trial of a most expensive lawsuit if it be granted that it is impossible to frame an effective, valid and meaningful judgment.

IV. Motion to Recuse the Trial Judge. Title 28, U.S.C., Section 445, deals with disqualification of the trial judge. This section was amended in 1974 to include as a most important ground of disqualification the reasonable appearance of partiality even when that partiality is not an existent fact:

"Section 445(a) Any justice, judge, magistrate or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

In the event we decide to make a recusal motion, Section 445(a) will serve as our most fertile ground for disqualification. There is no need to state here numerous basis in the facts for appearance of partiality which could easily be stated in our affidavit in support of this motion. We might also see what we can do with Section 455(b)(4):

"He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter or is a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." (emphasis added)

The general rule in the state courts (those states which do not provide for automatic disqualification or substitution of a judge) is that mandamus is available to obtain an immediate appellate review of a judge's refusal to recuse himself or to certify his disqualification. See 45 A.L.R. 2d 937. That ALR article goes so far as to comment upon the wisdom of allowing mandamus to review denial of motions to recuse:

"By way of comment, it may be suggested that since it is universely (sic) agreed that in the absence of a waiver of the disqualification, any judgment rendered by a disqualified judge is void, and since the question of disqualification is a matter separable from the merits of the pending litigation, a judge's refusal to disqualify upon a timely application therefor should be subject to immediate review, either by appeal or by mandamus, so as to avoid the expense and delay of what might prove to be a wholly abortive trial." 45 A.L.R. 2d at p. 939.

In the federal courts there is a clear cut split of authority. It is the view of the following courts at least that mandamus is appropriate. This is certainly true among the Court of Appeals for the District of Columbia, the Fourth Circuit, the Second Circuit, the Eighth Circuit and a variety of district judges. The only problem is that the Seventh Circuit seems to have come out rather strongly against this view. In Korer v. Hoffman (1954), 212 F. 2d 211, 45 A.L.R. 2d 930 and People ex rel. Tinkoff v. Campbell (1954), 212 F. 2d 785. The Seventh Circuit holds that the mere fact that the petitioners would be put to the inconvenience and expense of what might prove to be a wholly abortive trial does not constitute grounds for invoking mandamus power.

Certainly the view that mandamus is available appears to be the more scholarly and learned view. If we proceed quickly with a motion to recuse taking a writ of mandamus

Supreme Court, U. S.
FILED
OCT 12 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

BRIEF OF THE STATE OF ILLINOIS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
JOSEPH V. KARAGANIS,
SANFORD R. GAIL,
Special Assistant Attorneys General,
KARAGANIS & GAIL LTD.,
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October 11, 1979.

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QUESTIONS PRESENTED.

I. Were the district court's findings that viral and bacterial pathogens discharged by defendants contaminated Illinois waters and that defendants' discharges made a significant contribution to the eutrophication of Lake Michigan "clearly erroneous"?

II. Has Congress, in Public Law 92-500 as amended by Public Law 95-217, prohibited the states from seeking the imposition of more stringent treatment than the national minimum levels of treatment through the use of state statutes, federal common law or state common law?

III. Did the district court have *in personam* jurisdiction, and was venue proper in the district in which the injury occurred?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

BRIEF OF THE STATE OF ILLINOIS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

A. Introduction.

Petitioners City of Milwaukee, the Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee (hereinafter referred to collectively as "Milwaukee") have petitioned this Court to grant a writ of certiorari to review the decision of the appellate court below. Basically, Milwaukee challenges the district court's findings of fact and the appellate court's affirmance that Milwaukee discharges enormous volumes of raw, untreated human fecal waste into Lake Michigan and that shore parallel currents transport these wastes containing billions of bacterial and viral pathogens (disease-causing agents) into Illinois waters, thus

creating a major health hazard for Illinois swimmers and for Illinois' public water supply. Beyond challenging its liability for creating a common law public health nuisance, Milwaukee seeks to challenge the basic remedy ordered by the district court and by the appellate court—*i.e.* that raw human fecal waste should be collected and transported to waste treatment facilities for treatment instead of being discharged raw into public waters.

In its petition Milwaukee seeks to gain this Court's attention by seriously misrepresenting the evidence presented to the district court, the findings and logic of the district court and appellate court, and the state of the law.

B. Defendants' Sewage Collection System.

To properly appreciate the enormity of the raw sewage problem caused by Milwaukee, one must understand the collection system Milwaukee has built to transport raw human fecal wastes from its residential or commercial source to its treatment plants. If the public health hazard were not so great, Milwaukee's sewage collection system could be admired as the ultimate invention of Rube Goldberg. Among the system's unique features:

1. Milwaukee has consciously followed the practice of building large sewers which would be intentionally connected into smaller sewers leading to the treatment plants. When the large sewers fill up with raw sewage, the smaller sewers cannot handle the hydraulic load. Rather than build larger "downstream" sewers adequately sized to carry the hydraulic load of the large "upstream" sewers, Milwaukee has built overflow devices to pour the raw fecal wastes into the local rivers or into Lake Michigan.

2. Also unique to Milwaukee is their system of giant "flushing tunnels." The stench of the enormous volumes of raw fecal waste discharged from these overflow devices becomes so severe that the city maintains two giant "flushing tunnels" to draw in clean Lake Michigan water

to the upper reaches of the local rivers and to literally "flush" the raw fecal wastes into Lake Michigan.

In Milwaukee, the basic pattern for sewage collection is by means of a house lateral sewer connected to a municipal collector sewer under the street. The municipal collector sewer then connects to a large "interceptor" sewer system which carries fecal waste—principally by gravity flow—to a treatment plant for treatment (Tr. 118, Tr. 426). In Milwaukee this "interceptor" system is called the "MIS" or Metropolitan Interceptor System (Tr. 120, Tr. 426).

Beginning in the post-war years, Milwaukee began extending sewer service to more and more residential and commercial areas (Tr. 206). These new sewer extensions and the new sewage loads from these areas were connected to the existing interceptor system creating hydraulic overloads in the interceptor system, *i.e.* more sewage flow than the pipe can handle (Tr. 139). Not the least cause of these hydraulic overloads was defendants' conscious practice of building larger diameter sewers in outlying areas which were connected to smaller diameter sewers leading to the treatment plant.[1]

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1. On adverse examination, Mr. Weiland, Director of Engineering for the Sewerage Commission, testified:

> Q. Isn't it correct that in the development of the Metropolitan Interceptor System, pipes of a larger capacity were connected to pipes downstream which had a lesser capacity?
> A. Yes. (Tr. 139-140.)
>
> * * * * *
>
> Q. What size sewer does that 72-inch special section sewer lead into?
> A. I believe it is a 42-inch. (Tr. 333.)
>
> * * * * *
>
> Q. And this 72-inch system in 1949 was then connected into a 42-inch system, isn't that right?
> A. Yes. (Tr. 333-334.)
>
> * * * * *
>
> Q. Wasn't the sewer built with full knowledge by the staff that the 42-inch sewer was hydraulically undersized so that it couldn't handle the load of the 72-inch sewer?

(Footnote continued on next page.)

These hydraulic overload problems are exacerbated by rain storms. In most of the Milwaukee metropolitan area the defendants have constructed "separate" sanitary and storm sewers. The sanitary sewers are the sewers intended to carry human fecal wastes to the treatment plants. However, rain water from downspouts or storm drains is often discharged into the already hydraulically overloaded sanitary sewers. The result is an exacerbation in both volume and duration of the raw sewage overflow.

Thus, while periods of hydraulic overload and resultant overflow are often associated with rainfall events, these hydraulic overloads and resultant overflows have been known to extend over both dry and wet periods and to result in continuous discharge of raw sewage into the rivers and lake for as long as 30 days.

Also discharging into this hydraulically overloaded interceptor system are a series of collector sewers that were designed to carry both storm and fecal ("sanitary") wastes ("combined" sewers). These sewers also overflow both because of hydraulic overload in these "combined" collector sewers and because the interceptor system into which these combined sewers discharge is already hydraulically overloaded due to upstream hydraulic loads.

At the present time Milwaukee maintains several hundred overflow devices or structures throughout the metropolitan area —both on the interceptor (MIS) system and on local collector sewers. Overflows of raw human fecal wastes from these devices occur approximately 50 times a year and last up to 30 days and contain billions of gallons of fecal wastes.

As noted above, Milwaukee has developed a unique system for ridding itself of the obnoxious odors and disease hazard

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(Footnote continued from preceding page.)

A. Yes.

Q. And the staff for the commissions went ahead and built the sewer without at that time providing for adequate hydraulic capacity, isn't that correct?

A. Yes. (Tr. 334.)

represented by these raw sewage overflows. The overflows discharge either into Lake Michigan or into local rivers which then flow into Lake Michigan. In storms the rivers' flow is sufficient to move the fecal wastes from the rivers into Lake Michigan. To assist the rivers' flow in dry weather defendants maintain huge "flushing" tunnels. These tunnels draw clean Lake Michigan water into the upper reaches of the river and use that water to literally "flush" the fecal wastes out into Lake Michigan.

C. The Health Hazards of Untreated Sewage.

The raw sewage discharged by Milwaukee contains enormous numbers of pathogenic[2] organisms, both bacteria and viruses. Any urban center like Milwaukee contains persons who are infected with pathogens and who are shedding bacterial and viral pathogens through their feces (Tr. 3101, 2174). A single gram—1/454 pound—of human feces from an infected individual can contain literally millions of viruses (Tr. 10278). Depending on the level of disease within the community, raw sewage can contain from approximately seven thousand to several hundred thousand viruses per liter (Tr. 2180).

Bacteria and viruses are two totally different pathogenic groups. Within the bacteria group there are hundreds, if not thousands, of different strains of pathogenic bacteria. For example, two common pathogenic bacteria associated with fecal matter are Salmonella and Shigella. Salmonella has over 400 different subtypes, and Shigella has over 600 different subtypes (Tr. 3053). Indeed, the total number of bacterial pathogens is not really known (Tr. 3053).

Bacterial pathogens cause diseases of severe discomfort and sometimes serious complications. Basically, when ingested these organisms cause intense diarrhea (Tr. 3054). Other bacteria—

2. The noun "pathogen" or the adjective "pathogenic" refers to the disease-causing nature of these organisms (Tr. 2155).

known as "opportunistic" pathogens—can create serious secondary infections in injured persons or serious illness in the very young or elderly (Tr. 3055).

The other and perhaps more serious group of pathogens found in fecal wastes are viruses. Viruses which pass from the body in feces are called "enteric" viruses (Tr. 2149).

A virus is an incredibly small object measuring less than one millionth of an inch in diameter (Tr. 10171). Many people who get infected by enteric viruses do not show any disease symptoms. Viruses simply multiply in the lining of the gut and are excreted with the feces without causing any disease symptoms (Tr. 2157). A thousand people may become infected before one shows a clinical symptom of the disease. Yet these asymptomatic infected carriers pass on just as many viruses as a diseased person (Tr. 2145, 2157, 2174). Thus, thousands of people can become infected and become carriers and multipliers of an enteric viral disease without any indication of the disease being present.

Actual disease symptoms only appear when a particular virus enters the bloodstream through the lymph glands (Tr. 2143) and attacks a "target" organ, such as the heart, lungs, brain or central nervous system (Tr. 2157). Polio is an enteric virus that attacks the tissue of the spinal cord (Tr. 2161, 2165). Coxsackie virus causes pleurodynia—a disease of the covering of the lungs which causes a great deal of inflammation and pain (Tr. 2164). Coxsackie B virus has as its target organ the muscle tissue of the heart causing such diseases as pericarditis (Tr. 2167) and myocarditis. Myocarditis is a particularly severe and sometimes fatal heart disease in young children (Tr. 2160). Coxsackie viruses also have been found to increase the incidence of birth defects (Tr. 2167) and are suspected of triggering diabetes in susceptible individuals (Tr. 13211). Hepatitis A is an enteric virus which attacks the liver (Tr. 2168).

The common denominator of all these enteric viruses is that they leave the body of a carrier by means of the feces

(Tr. 2147). Thus, fecal material is a necessary link in the transmission of the virus to the next victim. This is called "fecal-oral transmission" (Tr. 2155).

Viruses are incredibly difficult to detect with accuracy. The common test is to place suspected viral fluid on a bed of animal or human embryo tissue. If the tissue on the cell becomes infected, the number of infected areas are counted as plaque-forming units (Tr. 2179). Unfortunately, this test is very inaccurate and will not detect known viruses. For example, Hepatitis A cannot be grown or isolated with the test (Tr. 10193). Many viruses will only grow in certain types of cell tissue and will not show up in other virus tests at all (Tr. 12134, 12320). Moreover, because viral particles are not distributed uniformly through a volume of liquid, it is possible to completely miss substantial quantities of viruses under standard testing techniques (Tr. 12333).

D. The Transport of Those Disease-Causing Organisms to Illinois Waters.

The Court of Appeals below summarized the district court's findings regarding transport of these disease-causing organisms as follows:

> The district court found that the defendants dump substantial quantities of pathogen-containing sewage into Lake Michigan each year, that the lake currents carry the pathogens into Illinois waters, where they may infect drinking water supplies and pose a danger to swimmers, and therefore that defendants' actions pose a significant risk of injury to Illinois residents. These findings are not clearly erroneous. Rule 52, Fed. R. Civ. P. (Appendix A-26 to A-27.)
>
> The district court found that "bacteria and viruses numbering literally in the millions are transported live and intact from Milwaukee to Illinois waters." [Tr. 14217.] This finding is not clearly erroneous. (Appendix B-10.)

There is no need here to extensively discuss the evidence of transport of these pathogens. The Court of Appeals discusses the evidence at length. (*See* Appendix A-29 to A-30; B-10 to B-25.) It is sufficient to observe that even defendants' own experts—based on their own tests in Lake Michigan—admitted that Milwaukee's sewage is carried by prevailing currents into Illinois waters several times a year (Tr. 7175; 8931).

E. The Procedural History of This Case.

Milwaukee's enormous discharges of raw sewage into Lake Michigan and thence into Illinois waters led Illinois to bring an original action before this Court in 1971. In 1972 this Court held that Milwaukee was not a state for purposes of mandatory original jurisdiction by the Supreme Court over actions between the states under 28 U. S. C. § 1251(a)(1). This Court did hold, however, that Illinois could bring an original action against Milwaukee in the federal district court under the doctrine of federal common law nuisance. *Illinois* v. *City of Milwaukee,* 406 U. S. 91 (1972).

In 1972 Illinois filed a complaint in federal District Court seeking to abate Milwaukee's fecal discharges.[3] The complaint was in three counts. Count I charged Milwaukee with the creation of a federal common law nuisance. Count II charged Milwaukee with violation of statutory prohibitions against water pollution contained in the Illinois Environmental Protection Act. Ill. Rev. Stat. Ch. 111½ § 1001 *et seq.*[4]

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3. In addition to the raw sewage discharges, Illinois also sought relief against the discharge of improperly and inadequately treated sewage that reached Milwaukee's two treatment plants. The remedial order of the district court regarding such treatment and the overturning of that order on the basis of extra-record factual assumptions is the subject of the State of Illinois' Petition for a Writ of Certiorari, filed October 5, 1979 (No. 79-571).

4. Ill. Rev. Stat. Ch. 111½, § 1012 states in part:

No person shall:

(a) Cause or threaten or allow the discharge of any contaminants into the environment *in any State so as to cause*

(Footnote continued on next page.)

Count III charged Milwaukee with the creation of a common law nuisance under Illinois law pursuant to the remedy articulated in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493 (1971).

The case came to trial in January, 1977. After hearing months of testimony and reviewing hundreds of exhibits, the district court entered judgment finding defendants' discharges constituted:

(a) a federal common law nuisance;

(b) a common law nuisance under Illinois state law;

(c) a violation of the Illinois Environmental Protection Act which prohibits any acts which may cause water pollution in Illinois (Appendix F-2, F-24).

The basis of defendants' liability was two-fold. First, the district court found that Milwaukee's enormous discharges of raw and partially treated sewage created a serious health hazard to the residents of the State of Illinois (Appendix F-6 to F-8; F-15. *See* Court of Appeals decision and order, Appendix A-26 to A-27; B-2 to B-25).

As a second basis of liability, the district court found that Milwaukee's discharges contained huge amounts of phosphorus and other nutrients which are accelerating eutrophication of Lake Michigan and are causing taste and odor problems, un-

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(Footnote continued from preceding page.)

> *or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources,* or so as to violate regulations or standards adopted by the Pollution Control Board under this Act. (Emphasis added.)

Ill. Rev. Stat. Ch. 111½, § 1003(n), defines "water pollution" as:

> [S]uch alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, *as will or is likely to create a nuisance* or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life. (Emphasis added)

pleasant bathing conditions and a hostile environment to aquatic life (Appendix F-16 to F-20).

F. The Remedy Ordered by the District Court.

The remedy ordered by the district court is rather simple in its logic and evidentiary basis:

1. *Collection.* The district court ordered that all of the raw sewage be collected for treatment instead of being discharged raw into Lake Michigan.

2. *Treatment.* The district court then ordered that all of the raw sewage—once collected—be treated to destroy the disease-causing organisms in the sewage.[5]

Several important procedural observations are necessary here. The district court did not select or dictate the method or the time schedule for achieving collection of sewage. The evidence had established several methods for effective collection. These methods included:

1. Sewer separation, *i.e.* taking the storm drainage—intentional or unintentional—out of the sanitary sewer and leaving the adequately sized sanitary sewer to carry the sewage to the plants.

2. Collection, Storage, Treatment (CST). Rather than separate the storm drainage from the sanitary waste, the design here is to collect the mixture of storm water and sewage, store it, and then gradually pump the stored wastes for treatment.

The district court did not select or order a particular method of collection:

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5. The level of treatment ordered by the district court is not at issue in Milwaukee's Petition. As noted below the appellate court reversed the district court's treatment order on the extra-record and erroneous factual assumption that "secondary" treatment—established as a *minimum* treatment by the Clean Water Act, 33 U. S. C. §§ 1251 *et seq.*, would destroy viruses. The appellate court's action is the subject of the State of Illinois' Petition for a Writ of Certiorari.

> . . . I am not going to order any particular method to be employed at this time. I am interested in results. The methods are a matter of design. (Decision of July 29, 1977.) (Appendix F-26.)

Milwaukee—not the district court—then proceeded to select a collection, storage, treatment (CST) system as the basis of collection. The Judgment Order of which Milwaukee now complains was prepared by Milwaukee lawyers and engineers (with plaintiffs' participation) and submitted to the district court for approval on November 14, 1977.

Milwaukee not only selected the method of collection; Milwaukee also selected the timetable for collection and elimination of raw sewage overflows. This timetable calls for a staged program of overflow correction which will be completed by 1989.[6] Indeed, having negotiated the timetable with plaintiffs, having stipulated as to the feasibility of the timetable (Appendix E-2), and having submitted the timetable to the district court, Milwaukee can hardly complain about the timetable.

Moreover, there is an additional procedural aspect of the district court's order which deserves attention here. Throughout its appeal before the Seventh Circuit and in its petition here, Milwaukee continues to assert extra-record boxcar numbers as to the hundreds of millions of additional dollars the remedy ordered by the district court (and affirmed by the Court of Appeals) will cost beyond the program purportedly established by Wisconsin under the NPDES[7] permit. (*See*, e.g. Milwaukee petition, p. 22.) Yet the Judgment Order specifically provides for evidentiary hearings in the district court if Milwaukee wishes to modify the Judgment Order to allow a lower-cost remedy.

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6. Note that under the Clean Water Act, so often misquoted by Milwaukee, the outside deadline for Publicly Owned Treatment Plants to achieve secondary or more stringent treatment is 1983, a far tighter deadline than that included by Milwaukee in the Order it now challenges.

7. National Pollutant Discharge Elimination System, 33 U. S. C. §§ 1341-1344.

> Should defendants develop information which establishes in defendants' opinion that separation of all or part of the system is a preferred alternative, which will provide a collection and treatment level equal to or better than that required herein then defendants may apply to the Court for modification of this paragraph to provide therefor. (Judgment Order.) (Appendix D-4.)

Pursuant to the Judgment Order, Milwaukee has recently submitted cost figures to the State of Illinois which show that a combination of separation and CST (Collection/Storage/Treatment) is the lowest cost alternative. The recently submitted cost figures show that defendants can achieve a higher level of protection than the district court's order at a cost *less than* or the same as the system agreed to by defendants in their state consent decree. The reason for this dramatic improvement is simple—with separation the rainfall does not get into the sanitary sewer. Thus, there will be no overflows even under the most intense storm.

Illinois does not wish to debate these extra-record issues before this Court. Suffice to say that defendants' claims of enormous cost differentials are not supported in the record and that the Judgment Order expressly provides a fact-finding mechanism for lower cost collection alternatives in the district court. Factual disputes with preliminary discovery and attendant adversarial examination are best decided by district courts and not on extra-record pronouncements by counsel on appeal.

G. The Decision by the Court of Appeals.

On appeal of the Judgment Order by Milwaukee, the Court of Appeals affirmed the district court's finding of liability on the federal common law nuisance count.[8] In reviewing the issue

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8. The Appellate Court declined to consider the state statutory common law counts (Appendix A-46 n. 53), a matter raised in Illinois' Petition for Certiorari.

exercise jurisdiction over these defendants on claims arising under State common law nuisance, the Court said:

> The courts of Ohio, under modern principles of the scope of subject matter and *in personam* jurisdiction, have a claim as compelling as any that can be made out for this Court to exercise jurisdiction to adjudicate the instant controversy, and they would decide it under the same common law of nuisance upon which our determination would have to rest. In essence, the State has charged Dow Canada and Wyandotte with the commissions of acts, albeit beyond Ohio's territorial boundaries, that have produced and, it is said, continue to produce disastrous effects within Ohio's own domain. While this Court, and doubtless Canadian courts, if called upon to assess the validity of any decree rendered against either Dow Canada or Wyandotte, would be alert to ascertain whether the judgment rested upon an even-handed application of justice, it is unlikely that we would totally deny Ohio's competence to act if the allegations made here are proved true. See, *e.g., International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945). 401 U. S. at 500.

The second issue, whether the discharge of pathogens into Illinois waters constitutes the commission of a tortious act in Illinois, is also well settled. For purposes of the Illinois long-arm statute, "a tort is committed in the place where the injury occurs." *McBreen* v. *Beech Aircraft Corp.*, 543 F. 2d 26, 28 (7th Cir. 1976); *Honeywell, Inc.* v. *Metz Apparatewerke,* 509 F. 2d 1137, 1142 (7th Cir. 1975); *Consolidated Laboratories, Inc.* v. *Shandon Scientific Co.,* 384 F. 2d 797, 802 (7th Cir. 1967).

The District Court so plainly had jurisdiction that the issue is not worthy of certiorari.

of liability, the appellate court engaged in an extensive review of the evidence and applied the "clearly erroneous" standard of Rule 52(a), Fed. R. Civ. P.

On the question of remedy, the Court of Appeals affirmed the district court's order that all sewage be collected. The appellate court gave three reasons for its affirmance:

> 1. Of primary significance was the repeated admission by defendants that discharge of raw sewage was not an acceptable long-term alternative to collection and treatment:
>
> > It is doubtful whether anyone, layman or expert, would argue that the discharge of raw sewage into public waters is a satisfactory alternative to collection and treatment of sewage, even though it may be conceded that it may take time to fund and provide collection and treatment facilities, and therefore the raw sewage discharges may have to be endured for the short term. Donald Weiland, Director of Engineering for the Sewerage Commission of the City of Milwaukee, flatly stated that discharging raw sewage into public waters as a permanent solution to sewage overloads was not "sound sanitary engineering practice."
> >
> > > Q. As a design engineer responsible for designing sewers with adequate hydraulic capacity, do you consider it sound sanitary engineering practice to design and install overflow devices which are intended to permit the discharge of raw sewage as a permanent solution to hydraulic overloads on an interceptor system?
> > >
> > > A. Certainly not.
> >
> > [Tr. 201.] Similarly, Dale Lundy, a hydraulic and sanitary engineering consultant called by plaintiffs, testified that collection and treatment is "considered preferable" to discharge of raw sewage. [Tr. 907.] Defendants point to nothing in the record that would even suggest that the discharge of raw sewage into public waters is either an acceptable long range solu-

> tion to the problem of disposing of human wastes or a practice that can be regarded as safe. (Appendix A-34 to A-35.)

2. The appellate court also noted the inherent illogic in requiring municipalities to build and operate massive treatment plants to meet specific effluent limitations if in the same area the same municipalities could discharge raw sewage at will from the collection system:

> It would be senseless to prohibit the discharge of effluent from publicly owned treatment works not meeting the secondary treatment requirements of § 301(b)(1)(B), if raw sewage can nonetheless be discharged at will from overflow points before it reaches the treatment works. (Appendix A-32 to A-33.)

3. Finally, the appellate court noted that the consent decree signed by Milwaukee with the State of Wisconsin[9] was virtually open-ended and set no specific dates by which all overflows would be eliminated (Appendix A-34). In contrast the appellate court noted that defendants had stipulated as to the feasibility of the completion date requirements in the federal Judgment Order:

> Defendants concede the feasibility of the completion date requirements. (Appendix A-38.)

On the question of what treatment is necessary to destroy viruses, the appellate court had doubts about the need for the degree of treatment ordered by the district court. Rather than apply the "clearly erroneous" standard to the evidentiary basis of the district court's treatment remedy or alternatively to remand for the taking of additional evidence, the appellate court

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9. Milwaukee's NPDES permits simply allowed overflows to occur without any treatment or collection requirements. All the permits contained was an ill-defined obligation to "initiate programs leading to elimination or control of overflows" (Appendix A-33). As the federal trial was coming to a close, Milwaukee entered into a secretly negotiated "consent" agreement with the State of Wisconsin (DX 1311) which Milwaukee then and now claims bars more specific federal court action.

adopted the "secondary" treatment limits imposed by § 301(b)(1)(B) of the Clean Water Act. The appellate court adopted the United States Environmental Protection Agency's definition of secondary treatment (40 C. F. R. Part 133) as that level of treatment sufficient to destroy virus, on the extra-record assumption that EPA had concluded the "30/30" secondary limit was sufficient to destroy virus.

As emphasized in Illinois' petition, the appellate court had no record support for this assumption. Indeed, all the evidence in the record was to the contrary—*i.e.* that a 30/30 limit would allow billions of viruses to be discharged daily from defendants' plants. Moreover, by unquestioningly accepting "secondary" treatment (*i.e.* 30/30) as the basis for applying its "common law of the statute" theory (A-21, A-23, A-46), the appellate court ignored the entire statutory mechanism under Sections 303, 302 and 301(b)(1)(C) of the Clean Water Act[10] for imposing more stringent effluent limitations on public and private point sources to protect valuable water quality resources, such as Lake Michigan. This question of treatment levels is discussed extensively in Illinois' petition and need not be discussed further here.

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10. 33 U. S. C. §§ 1313; 1312; 1311(b)(1)(C).

REASONS FOR DENYING THE WRIT.

I.

THE DISTRICT COURT'S COLLECTION ORDER IS NOT INCONSISTENT WITH THE CLEAN WATER ACT.

In a rather disjointed argument unsupported by citations to legal authority, Milwaukee attempts to characterize the district court's order that raw sewage be collected as contradictory to the Congressional policy set forth in the Clean Water Act. Milwaukee submits a melange of arguments—all of which are erroneous.

A. Congress Did Not Preempt the Imposition of More Stringent Requirements Than Those Imposed Under the Clean Water Act.

A careful reading of the Clean Water Act, 33 U. S. C. §§ 1251 *et seq.* clearly establishes Congress' intent to allow the imposition of requirements more stringent than those required by the Act and to preserve all remedies—both statutory and common law—which existed prior to the statute.

Defendants have ignored Section 510 of the 1972 Amendments, 33 U. S. C. § 1370, which expressly allows a state or political subdivision to impose more stringent requirements:

> 1370. *State authority.* Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not

> adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

The House Public Works Committee stated:

> The Committee considers section 510 to be of extreme importance in assuring the States of the right to adopt or enforce provisions at least as strict as those established in this legislation. Thus, *the Committee rejected in most instances suggestions for preemption by the Federal Government* and preempted the States only where the situation warranted it based upon the urgent need for uniformity such as in section 312(f) relating to marine sanitation devices. Vol. 1 Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 823. (Hereinafter cited as "Legislative History"; emphasis added.)

Since the passage of the 1972 Amendments, the courts have uniformly recognized the rights of states or local subdivisions to require more stringent requirements than the national minimum.

> By contemplation of minimum federal standards, however, Congress did not intend to relegate the States to the status of enforcement agents for the executive branch of the federal government. To the contrary, it is indisputable that Congress specifically declined to attempt a preemption of the field in the area of water pollution legislation, and as much as invited the States to enact requirements more stringent than the federal standards. *Mianus River Preservation Comm.* v. *E.P.A* , 541 F.2d 899, 906 (2d Cir. 1976).

Such tougher state requirements can be imposed by state statutory requirements or as the result of state common law nuisance

actions.[11] *See, Committee for Jones Falls* v. *Train,* 539 F. 2d 1006, 1009 n. 9 (4th Cir. 1976); *see* also, *Metropolitan Sanitary District* v. *United States Steel Corp.,* 30 Ill. App. 3d 360, 323 N. E. 2d 426, 434 (1st Dist. 1975), *cert. denied* 424 U. S. 976 (1976); *People ex rel. Scott* v. *United States Steel Corp.,* 40 Ill. App. 3d 607, 352 N. E. 2d 225, 229 (1st Dist. 1976); *Illinois* v. *City of Milwaukee,* 366 F. Supp. 298 (N. D. Ill. 1973); *Cf., Village of Glencoe* v. *Metropolitan Sanitary District,* 23 Ill. App. 3d 868, 320 N. E. 2d 524 (1st Dist. 1974).

Nor did Congress in any way seek to restrict this right to more stringent standards in the 1977 Amendments. In the Senate Report on the 1977 Amendments, the Senate Public Works Committee states:

> There is nothing in these new provisions which in any way preempts the rights of States to have more stringent water quality standards or associated effluent limitations; . . . S. Rep. No. 95-370, p. 43, 4 Legislative History, 676.

Just as states and their political subdivisions were entitled to require more stringent discharge requirements under the Act, so also were their various pre-existing common law and statutory remedies preserved. Section 505, 33 U. S. C. § 1365, creates a specific statutory cause of action for any citizen—regardless of standard—to enforce any effluent limits imposed by the Act. By its express terms the cause of action created by Section 505 is limited to enforcing the specific limits set under the FWPCA. Section 505 does not create any right to enforce obligations not in the Act.

Milwaukee seeks to characterize a common law nuisance action as an action brought under § 505 and therefore subject to the permit defenses of § 402(k). However, common law

11. Indeed, under the Clean Water Act, the EPA Administrator must take cognizance of these more stringent standards and incorporate them into the EPA permit. Under § 301 of the FWPCA, a publicly-owned treatment works must meet "any more stringent limitation" beyond secondary treatment established pursuant to any state or other federal law. § 301(b)(1)(C), 33 U. S. C. § 1311 (b)(1)(C).

nuisance actions are not statutory actions brought under § 505. *Stream Pollution Control Board* v. *United States Steel Corp.*, 512 F. 2d 1036, 1041 (7th Cir. 1975).

Congress wanted to make clear that Section 505 did not bar any other action which might exist—as here—under common law or statute. Section 505(e) of the 1972 Amendments states:

> (e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). 33 U. S. C. § 1365(e).

The House Report on the 1972 Amendments states:

> Subsection (e) provides that the right of persons (or class of persons) to seek enforcement or other relief under any statute or common law is not affected. 1 *Legislative History* 821.

Likewise, the Senate Report says:

> It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for damages. 2 *Legislative History* 1499.

As the Illinois Appellate Court held in rejecting an argument by United States Steel Corporation identical to that made by defendants here:

> The clear intent of Congress to allow the states or their political subdivisions the primary responsibility for enforcing their own, *more stringent standards by common law nuisance actions* [citations omitted] or the equally clear intent of our legislature to confer that responsibility on the Attorney General [citations omitted] would be thwarted by a stay of these proceedings. *People ex rel. Scott* v. *United States Steel Corp.*, 352 N. E. 2d at 228-229. (Emphasis added.)

All federal courts which have considered the question uniformly refused to strike common law nuisance claims on the grounds that they had been pre-empted by the Clean Water Act. *California Tahoe Regional Planning Agency* v. *Jennings,* 594 F. 2d 181, 193 (9th Cir. 1979); *Township of Long Beach* v. *City of New York,* 445 F. Supp. 1203, 1214-15 (D. N. J. 1978); *U. S.* v. *Outboard Marine Corp.,* ..... F. Supp. ....., 12 ERC 1346, 1348 (N. D. Ill. 1978); *Board of Supervisors of Fairfax County, Virginia* v. *U. S.,* 408 F. Supp. 556, 562 (E. D. Va. 1976); *U. S.* v. *Ira S. Bushey & Sons, Inc.,* 363 F. Supp. 110, 120 (D. Vt. 1973); *U. S.* v. *Lindsay,* 357 F. Supp. 784, 794 (E. D. N. Y. 1973); *U. S. ex rel. Scott* v. *U. S. Steel,* 356 F. Supp. 556, 559 (N. D. Ill. 1973); *U. S.* v. *Ira S. Bushey & Sons, Inc.,* 346 F. Supp. 145, 149 (D. Vt. 1972), *aff'd* 487 F. 2d 1393 (2d Cir. 1973), *cert. den.,* 417 U. S. 976 (1974). *Cf., Committee for the Consideration of the Jones Falls Sewage System* v. *Train,* 539 F. 2d 1006 (4th Cir. 1976).

Milwaukee cites *Jones Falls, supra,* as supporting the principle of preemption. However, that court held that a federal common law nuisance claim is barred where the alleged pollution was wholly intrastate. 539 F. 2d at 1010. Moreover, *Jones Falls* did recognize that the Clean Water Act did not preempt *state* common law nuisance actions, even if state common law nuisance actions imposed stricter standards. *Id.* at 1009 and n. 9.

B. The Statutory Procedure Under the Act Itself Contradicts Milwaukee's Arguments.

Apart from the express provisions of the Clean Water Act preserving the rights of states to impose more stringent requirements than those imposed by the Act, the statutory scheme of the Act itself contradicts Milwaukee's arguments:

> 1. While Congress has authorized the EPA Administrator to extend the deadline for publicly-owned treatment plants to meet secondary [§ 301(b)(1)(B)] or more strin-

gent limits imposed pursuant to § 301(b)(1)(C)[12]—where federal funds have not been available—this deadline can only be extended to "no later than July 1, 1983." 33 U. S. C. § 1311(i)(1). Congress did not authorize extensions beyond 1983. Here, by contrast, the district court's order is much more lenient, calling for completion by 1989.

2. Apart from the express statutory extension to no later than 1983, the absence of federal funding is not a defense to a discharger's failure to meet pollution limits. *State Water Control Board* v. *Train*, 554 F. 2d 921, 924-927 (4th Cir. 1977). Availability of federal funding under Title II of the Clean Water Act is not and cannot be a defense to compliance with Title III—either as to the secondary limits of § 301(b)(1)(B) or the more stringent limits of § 301(b)(1)(C).

3. The "cost-effective" analysis which Milwaukee cites so blithely does not relate to exemptions from the requirements of Title III. The "cost-effective" analysis requirement is simply that if federal funds are requested, federal funds granted under Title II be used for the least cost alternative which achieves the limitations imposed by Title III. Under Title III the results must be the same—achievement of the effluent limits of § 301(b)(1)(B) or § 301(b)(1)(C). Cost-effective analysis simply requires that those limits be achieved in the least cost way if federal grants are used to fund the achievement of these limits. *See* 40 C. F. R. Part 35, Subpart E, Appendix A.

Indeed, § 217 of the Clean Water Act—cited by Milwaukee—is directly related to selection of the least cost alternative to meet the Title III requirements. The legislative history of that section discloses Congress' concern that the pre-1977 cost-effectiveness guidelines had a strong bias toward funding conventional treatment in meeting the

12. Water quality related effluent limits imposed pursuant to the procedures of § 303 or § 302 or more stringent limits imposed under state law are preserved under § 510, 33 U. S. C. § 1370.

requirements of the Act. The basic purpose of § 217 was to require identification of innovative alternatives such as recycling of waste and beneficial uses of sewage as least-cost alternative means of meeting Title III limits. *See* S. Rep. 370, 95th Cong., 1st Sess., 40; H. Rep. 280, 95th Cong., 1st Sess., 73 (1977).

Neither Illinois nor the district court had any quarrel with the principle that Milwaukee should be allowed to pursue the least cost alternative in collecting its raw sewage. Indeed, as discussed above, the Judgment Order—drafted in concert by Milwaukee and Illinois—provides for modification to allow lower cost methods of collection to be installed if Milwaukee can establish that such methods are feasible. Moreover, Milwaukee has recently informed Illinois that it has developed such lower cost alternatives and wishes to submit these lower cost alternatives to the district court pursuant to the modification provisions of the Judgment Order. The preliminary cost information provided by Milwaukee indicates that separation of the sewers provides the least cost alternative to accomplishing the district court's collection order and that such costs are less than or approximately the same as the costs of meeting the open-ended consent decree with Wisconsin.[13]

4. Apart from the minimum requirements of the Act, the Act provides special procedures for protecting pure bodies of water such as Lake Michigan. Under the Act, each body of water is given individualized analysis to determine its desired uses and water quality needs. From this assessment of the desired uses and water quality needs, effluent limits tailored to the specific water quality needs of the receiving body of water can be fashioned. These limits are called "water quality related effluent limitations"

13. Again, these cost questions are properly placed before the district court under the Judgment Order rather than placed as bare allegations in a petition for certiorari.

and are mandated by § 303 and § 302 of the Act and by § 301(b)(1)(C).

Thus, contrary to Milwaukee's assertions—all municipalities are not to be treated alike. For example, dischargers into marine waters may have different effluent limits than dischargers into pure bodies of fresh water such as Lake Michigan. Each lake or river and its water quality needs are assessed on their own individualized merits.[14]

II.

MILWAUKEE'S EVIDENTIARY CLAIMS ARE SPURIOUS.

Milwaukee has taken snatches of the district court's findings and concocted a series of evidentiary claims that have little relationship to reality. It is sufficient to note that each of the defendants' evidentiary arguments was exhaustively examined by the appellate court and rejected. Both the district court and the appellate court found clear and convincing evidence of Milwaukee's liability (Appendix F-15; F-23; A-27). The appellate court's exhaustive analysis of the evidence is contained at pages B-2 through B-27 of the Appendix.

Defendants repeatedly cite *New York* v. *New Jersey*, 256 U. S. 296 (1921), and *Missouri* v. *Illinois*, 200 U. S. 496 (1906), as if the facts in those situations were identical to those in the instant case. But in each of those cases the plaintiff state was allowing its own dischargers to discharge equal or greater

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14. Without getting into a name-calling match with EPA—which is just the kind of feud Milwaukee seeks to engender—neither EPA nor Wisconsin has done a water quality needs analysis of Lake Michigan from the standpoint of virus or bacteria as required by § 303 of the Clean Water Act. The only forum which has ever related Lake Michigan water quality needs regarding virus and bacteria and which has worked back to impose water quality based effluent limits was the district court in this case. It should be noted that the principal witnesses before the district court urging collection of raw wastes and effective treatment were EPA's top experts on virus and bacteria.

amounts of sewage into the same watercourse, contaminating the same water:

> Where as here, the *plaintiff* has sovereign powers and *deliberately permits discharges similar to those of which it complains,* it not only offers a standard to which the defendant has the right to appeal, but *as some of those discharges are above the intake of St. Louis,* it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it that courts should not be curious to apportion the blame. *Missouri* v. *Illinois,* 200 U.S. 496, 522 (1906). (Emphasis added.)

In *New York* v. *New Jersey,* the complaining state allowed New York City to dump into the same waters seven times the volume of sewage (all untreated) as the proposed New Jersey discharge which was treated. 256 U. S. at 303.

Here, by contrast, Illinois has either completed or has under construction programs which have already eliminated or will eliminate all uncollected and untreated sewage discharges to Lake Michigan.

III.

THE DISTRICT COURT HAD IN PERSONAM JURISDICTION, AND VENUE WAS PROPER IN THE DISTRICT IN WHICH THE CLAIM AROSE.

As a final matter, Milwaukee has suggested that the case should have been dismissed because the District Court was without *in personam* jurisdiction over the defendants and further because venue was improper. These are disposed of easily.

A. The District Court Had in Personam Jurisdiction.

A district court's jurisdiction over the person of a non-resident defendant is dependent upon the extra-territorial service statute of the forum State. Fed. R. Civ. P. 4(e). In this case the Illinois "long arm" statute, Ill. Rev. Stat. Ch. 110, ¶¶ 16

and 17, control. Section 17, which lists the actions of a defendant by which it submits to the jurisdiction of an Illinois court, includes "[t]he commission of a tortious act within" Illinois. The Illinois Supreme Court has construed this provision to include acts done in other states which result in injury in Illinois, *Gray* v. *American Radiator & Standard Corp.*, 22 Ill. 2d 432, 176 N. E. 2d 761 (1961), and has stated that the long arm statute authorizes "the extension of jurisdiction over nonresident defendants to the extent permitted by the due process clause." *Gray* v. *American Radiator & Standard Corp., supra,* 176 N. E. 2d at 763; *Nelson* v. *Miller,* 11 Ill. 2d 378, 143 N. E. 2d 673, 679 (1957).

Confronted with this authoritative construction of the Illinois statute, Milwaukee is reduced to arguing (1) that its discharge of raw sewage and disease-causing organisms into Illinois waters does not constitute a sufficient "minimal contact" with Illinois to support *in personam* jurisdiction; and (2) that in any event this does not constitute commission of a tortious act in Illinois.

Milwaukee's first argument comes 100 years too late. In the era of *Pennoyer* v. *Neff,* 95 U. S. 714 (1877), attempts by states to exercise jurisdiction over persons outside of their territorial limits were invalid. This archaic doctrine, as well as the entire conceptual framework which supported it, have of course been rejected. *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945); *Shaffer* v. *Harris,* 433 U. S. 186 (1977). The relevant inquiry is whether the actions of the defendant establish "certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." [citation omitted] *International Shoe, supra* 326 U. S. at 316.

This Court has addressed this question in the context of interstate and international water pollution in *Ohio* v. *Wyandotte Chemicals Corp.,* 401 U. S. 493 (1971). Ohio had charged Michigan and Canadian corporate defendants with pollution of Lake Erie. Deciding that Ohio State courts could

B. Venue Was Proper in the District in Which the Claim Arose.

Venue is governed by 28 U. S. C. § 1391(b), which permits suit in *either* the "judicial district where all defendants reside, or in which the claim arose . . .". The Court's 1972 opinion in this case noted that this provision gives some "flexibility" to venue in this case. *Illinois* v. *Milwaukee, supra,* 406 U. S. at 108 n. 10.

Milwaukee contends that venue was improper in the Northern District of Illinois, and advances three reasons: (1) that the nuisance "arose" in Wisconsin; (2) that § 505 of the Clean Water Act places venue exclusively in the Eastern District of Wisconsin; and (3) that a municipality may only be sued in the District in which it is located. Each of these arguments is wholly specious.

1. Under the federal common law of nuisance an action "arises" in the place where the injury occurs. *Illinois* v. *Milwaukee,* 406 U. S. at 108 n. 10; *Ohio* v. *Wyandotte Chemicals Corp., supra,* 401 U. S. at 500. This general principle is consistent with the traditional view of tort law, which holds that "[t]he place of the wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place." Restatement, Conflict of Laws, § 377 (1934). This claim arose in Illinois.

2. Section 505(c)(1) is inapplicable to this action by its very terms:

> Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located. 33 U. S. C. § 1365 (c)(1).

This action was neither (a) respecting an effluent standard or limitation, nor (b) brought under the citizen suit pro-

visions of § 505. *See Stream Pollution Control Board* v. *United States Steel, supra,* 512 F. 2d at 1041. The venue limitations of § 505(c) are simply irrelevant.

3. Venue of an action against a municipality, based on the federal common law, is governed by § 1391(b), which allows it to be brought where the claim arose. *Illinois* v. *Milwaukee,* 406 U. S. at 108 n. 10. Milwaukee's arguments to the contrary are based upon either pre-1966 cases, which construed a different statute,[15] or on a single case involving suit against actions by Congress, in which special consideration limited venue to the District of Columbia.

Venue in this case was properly in the Northern District of Illinois.

15. The language "or in which the claim arose," which provides flexibility and a choice of venue, was added by P. L. 89-714, § 1 (1966).

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, filed by the City of Milwaukee, the Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee, should be denied.

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IN THE

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October Term, 1979

No. 79-408

CITY OF MILWAUKEE, et al.,

Petitioners,

v

STATE OF ILLINOIS, et al.,

Respondents.

BRIEF OF RESPONDENT STATE OF MICHIGAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Opinions Below, Jurisdiction, and Statutory Provisions Involved sections of the Petition are satisfactory to the Respondent, People of the State of Michigan.

QUESTIONS PRESENTED

I.

DOES THE DECISION OF THE COURT OF APPEALS, WHICH RECOGNIZES ACTIONS BY STATES TO ABATE INTERSTATE WATER POLLUTION PROBLEMS UNDER THE FEDERAL COMMON LAW OF NUISANCE, CONFLICT WITH DECISIONS ON THE SAME MATTER BY OTHER COURTS OF APPEALS OR THE SUPREME COURT?

II.

HAS THE COURT OF APPEALS' DECISION RECOGNIZING ACTIONS BY STATES UNDER THE FEDERAL COMMON LAW OF NUISANCE TO ABATE INTERSTATE WATER POLLUTION RAISED ISSUES OF SUFFICIENT IMPORTANCE THAT THIS COURT SHOULD GRANT CERTIORARI?

III.

IS THE STANDARD OF PROOF WHICH WAS APPLIED BY THE TRIAL COURT AND AFFIRMED BY THE COURT OF APPEALS IN CONFLICT WITH PRIOR PRECEDENT OF THIS COURT?

STATEMENT OF THE CASE

Petitioners' statement of the case is unacceptable because portions of it inaccurately reflect the content of the record established in the Trial Court and affirmed by the Court of Appeals. Careful review of the particular facts of this case is important because of the unique ecological problems caused by Milwaukee's pollution of Lake Michigan.

Petitioners, on page 10, inaccurately characterize the nature of the evidence before the Trial Court by stating "(the Plaintiffs' experts being limited to theories and the Defendants' witnesses reviewing actual tests performed by them as well as the applicable scientific theories)". In support of Respondent State of Michigan's claim that Milwaukee's discharges of excessive concentrations and quantities of the nutrient phosphorus was contributing to "accelerated eutrophication" of Lake Michigan expert witnesses presented considerable evidence in the form of testimony and studies. This evidence was carefully reviewed and relied upon by the Seventh Circuit in

support of its affirmance of the Trial Court findings. Reference to this evidence is found in Appendix pages B-26, and B-27.

Obviously, the record does not include proof that Lake Michigan is now in a eutrophic state. What it did show is that the conditions demonstrating the existence of "accelerated or cultural eutrophication" are present. Included in these conditions are the excessive phosphorus discharges by Petitioners, changes in types and quantities of biological organisms and increase in taste and odor problems in drinking water. Under Petitioners' apparent theory, in order to garner the empirical and demonstrative evidence to prove a nuisance it would be necessary to wait until the lake has suffered severe and irreparable pollution, i.e. eutrophication. Clearly such specious reasoning must fall of its own weight. The Courts below had before them numerous actual studies at various locations in the Great Lakes showing changes in the water related to nutrient inputs. The record also clearly showed that Milwaukee was the source of substantial nutrient input into Lake Michigan. Petitioners' argument that Respondents relied only upon theories is inaccurate.

Moreover, Petitioners make no mention that the Trial Court emphatically rejected their "actual tests" and their supporting theories as being inadequate and improperly conducted. In fact, regarding the Envirex studies presented by Petitioners the Trial Court ruled that it could attach almost no weight to these studies. (Appendix pages F-8 and F-9)

Petitioners, on page 11 set forth the proposition that the Trial Court improperly considered the highly technical matters presented in this lawsuit. Instead, Petitioners would have had the Court defer to the "expertise of the administrative body set up by Congress to deal with this subject", i.e., the United States Environmental Protection Agency (USEPA). Yet interestingly enough, at no point during the pendency of this

action did this "expert administrative body" take an active role in presenting their position or expertise to the Court. In fact, the USEPA's sole activity in the proceeding was highly improper *ex parte* correspondence with the Court following the conclusion of the trial and prior to the entry of the judgment order. The USEPA manner of presenting "expertise" in the matter was roundly chastized by the Court.

In the last paragraph of page 15 Petitioners represent to this Court that the Trial Court considered all the expert witnesses presented as nearly equal. This could not be further from the actual state of the record. While the Trial Judge did state that all of the witnesses were interested in the outcome of the case he specifically ruled that such circumstances standing alone did not make the witnesses biased in any individual sense. The Court stated "I have found some witnesses in this case who, despite their obvious commitment to particular points of view, are in my opinion honest, forthright, reasonably objective and who, in my opinion, made a genuine effort to be helpful to me in the resolution of these difficult problems." The Trial Court then went to particular length to specify and evaluate the witnesses in accordance with their competence and their credibility (F-5 and F-6). Moreover, the Trial Court went to even more detail in criticizing the studies and their presentation by Milwaukee's experts. (F-8 and F-9).

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS WHICH RECOGNIZES FEDERAL COMMON LAW OF NUISANCE ACTIONS BY STATES FOR INTERSTATE WATER POLLUTION PROBLEMS DOES NOT CONFLICT WITH ANY DECISIONS ON THE SAME MATTER BY THIS COURT OR ANY OF THE COURTS OF APPEALS.

Supreme Court Rule 19 indicates the character of the reasons which the Court will consider in granting certiorari. Two such indicators are decisions of a Court of Appeals which are in conflict with the decision of another Court of Appeals on the same matter. Important too, is a Court of Appeals decision which has decided a federal question in conflict with applicable decisions of this Court. Neither of these situations apply to the decision at issue in his Petition.

Petitioners do not point to a single case of this Court or of the Court of Appeals which conflicts with this decision. This is not surprising since the Seventh Circuit's decision represents a thoughtful and considered accommodation of statutory and judicial procedures for dealing with the problem of interstate water pollution.

The Court of Appeals correctly recognized the intent of Congress expressed in the Federal Water Pollution Control Act (FWPCA) as amended 33 USC § 1251 *et seq*, that common law rights and remedies continue to be available in specific cases. The right of states to establish and enforce more stringent limits on water pollution is clearly preserved in Section 510. The preservation of common law rights and remedies are preserved by Section 505(e). This analysis does not conflict with any cases.

Petitioners claim that the instant case provides an opportunity for this Court to redefine the scope of its 1972 *Illinois* v *Milwaukee* decision in light of the FWPCA, amendments of 1972 and 1977. In fact, there is nothing to redefine because the Court of Appeals decision recognizes the obvious relationship between the legislative and judicial functions with respect to interstate water pollution abatement problems. Here we have a clear accommodation of the broad and general legislative outline for dealing with such problems with specified minimum levels of pollution control. Additionally, there is

recognition of traditional equitable principles inherent in the judicial process which may be applied to specific factual circumstances where the general limits are inadequate.

Unable to find conflict with other cases, either in the Supreme Court or the Court of Appeals, Petitioners claim that a conflict exists between the Court of Appeals decision and the FWPCA. Such claims do not stand up under even the most cursory inspection. As just indicated, the Court of Appeals decision recognizes the proper sphere of legislative actions with respect to water pollution control and further recognizes the common law rights and remedies preserved by the FWPCA. Congress preserved common law rights and remedies with respect to water pollution abatement problems and Petitioners' arguments all would have been more appropriately given before the Congressional committees which structured the legislation.

It is interesting to note that Petitioners refer to Section 505(e) which provides for citizen suits while ignoring Sections 510 and 511 which the Court of Appeals decided were crucial to its analysis of the accommodation of common law and statutory remedies. Clearly, Petitioners' rather tenuous arguments do not withstand the proper analysis of all pertinent sections of the FWPCA.

Petitioners' arguments suggest that they are not pleased with the accommodation of parallel statutory and judicial procedures. But that framework was fashioned by Congress. What Petitioners ask is not that this Court review the decision of the Court of Appeals but, in effect that this Court review and overrule that which Congress has specifically recognized and preserved.

II.

THE COURT OF APPEALS DECISION RECOGNIZING FEDERAL COMMON LAW ACTIONS BY STATES FOR INTERSTATE WATER POLLUTION PROBLEMS FAILS TO RAISE ISSUES OF SUFFICIENT IMPORTANCE TO JUSTIFY THIS COURT'S GRANT OF CERTIORARI.

Petitioners raise the spectre of some 1300 municipalities nation wide being faced with financially burdensome pollution abatement requirements as the result of the Court of Appeals decision. Closer examination dispels the phantom. Even Petitioners seemingly agree that common law actions are preserved in Section 505(e) of the FWPCA. (Petition page 27). Sections 510 and 511 do make it clear that the States and the Court by implication are free to prescribe more stringent limits than those provided for in the FWPCA. Once that premise is established litigation such as the case at bar must be dealt with on the basis of its own particular factual circumstances.

When the requisite facts exist to establish a particular interstate water pollution problem which the statutory procedure is inadequate to handle there is a basis for common law action. They would be the exceptional case. There certainly has been no evidence of a rush of such common law actions.

Viewed in this light Petitioners in essence ask this Court to review this decision on its own factual and legal merits. This Court has usually denied certiorari when review is sought of a lower court decision which turns solely on an analysis of the particular facts involved. *United States* v *Johnston*. 268 US 220 (1925). The instant case fits this category. The Court has been even more reluctant to review factual issues where the findings of fact made by the District Court receive the concurrence of the Court of Appeals, *Graver Manufacturing Company* v *Linde Company*, 336 US 271 (1949).

III.

THE STANDARD OF PROOF AS APPLIED BY THE TRIAL COURT AND AFFIRMED BY THE COURT OF APPEALS DOES NOT CONFLICT WITH PRIOR DECISIONS BY THIS COURT.

Petitioners claim that the standard of proof utilized by the Trial Court and affirmed by the Court of Appeals in this case is in conflict with prior decisions of this Court. Petitioners refer to the prior Supreme Court cases, *Missouri* v *Illinois*, 180 US 208, 200 US 496 (1901, 1906); *New York* v *New Jersey*, 256 US 296 (1921). Both of those cases, controversies between states heard under the original jurisdiction of this Court, set the standard of proof to be clear and convincing evidence. However, in cases where this Court has exercised its original jurisdiction in interstate pollution cases it has applied a preponderance of the evidence standard when the defendant is a private party. *Georgia* v *Tennessee Copper*, 206 US 230 (1907).

Here the action was brought against a political subdivision of a state. Such political subdivisions are not "states" as used in 28 USC § 1251(a)(1). On the other hand the cases cited by Petitioners and mentioned above involve controversies between states. Thus the clear and convincing standard of proof required in those cases involving controversies between states is inapplicable here.

Thus, Petitioners' specious claim of conflict with other decisions of this Court presented in this portion of the Petition devolve in actuality to no more than argument about the particular facts of the case. As noted earlier this Court is not inclined to grant certiorari based solely on disputes as to the particular facts of the case, particularly when both the Trial Court and the Court of Appeals have agreed upon those particular factual circumstances.

SUMMARY

Respondent People of the State of Michigan submit that the Writ of Certiorari should be denied for the following reasons:

1. The decision of the Court of Appeals that federal common law rights and remedies for interstate pollution are preserved does not conflict with decisions of this Court or any Courts of Appeals.

2. The recognition by the Court of Appeals of federal common law rights and remedies for interstate water pollution problems lacks sufficient and imperative questions of public importance to justify jurisdiction of this Court.

3. There is no conflict on the matter of standard of proof between the Court of Appeals and decisions of this Court.

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IN THE
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No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

Petitioners' Reply to Illinois' Brief in Opposition to the Petition for a Writ of Certiorari

---

REASONS FOR GRANTING THE WRIT

I. As Even The Trial Court Recognized, Illinois' "Proof" Of A Health Hazard Was Speculative; *Absolutely No* Demonstrative Evidence Of A Nuisance Was Presented, Even Though Empirical Tests Could And Should Have Been Performed By Illinois.

The first fifteen pages of the Illinois brief in Opposition to the Petition for a Writ of Certiorari captioned "Statement of the Case", rather than setting forth the proceedings below concisely and without argument as an assistance to this Court in approaching the limited question before this Court — "Should

a writ of certiorari be granted?", are more in the nature of a jury argument. Those fifteen pages, rather than clarify, obfuscate the issues before this Court at this time.

The recitation of argumentative speculation by Illinois fails to state that *not one single pathogen* was shown in the record to actually *exist in* the waters of Lake Michigan either in Wisconsin or in Illinois; not one single pathogen *from any source,* much less one tied to a discharge from the Petitioners' sewer system. Additionally, the recitation fails to reflect the fact that the record does *not* show *a single infection or disease caused by a pathogen traceable to Lake Michigan* waters in either Wisconsin, where the discharge source exists, or in Illinois which is at a minimum of twenty-five miles away from the discharge source. Just as no single infection or disease has been shown to exist as a result of pathogens existing in Lake Michigan waters, so no outbreak or epidemic has been shown to have occurred in either state much less to have occurred and been a result of pathogens found in Lake Michigan waters.

It is however a matter of record that the types of pathogens which are being considered are by their nature pathogens which would cause infections or diseases to be manifest in relatively short periods of time. The record also shows that the discharges complained of by the State of Illinois have been consistently made for approximately 100 years during Milwaukee's existence. Illinois fails to explain how these *discharges occurred over this 100 year period without any adverse results occurring anywhere* and how, in view of those facts, they could be supportive of a health hazard nuisance claim in distant Illinois.

Even the District Court acknowledged that the proof presented by Illinois consisted of the speculations of experts and lacked any demonstrative or empirical evidence of nuisance. The District Court commented on Illinois' approach as follows:

> "Now, the State of Illinois had an opportunity to conduct its own study of the kind that Envirex conducted. It elected not to do so. In so electing, it is my opinion that *the state chose to produce*

> *less evidence than it should have.* My guess as to why they elected not to conduct their own study is that they were afraid of a negative result. Conducting such studies is dangerous, because, of course, they cut both ways; but if the position of the State of Illinois is correct, as I believe it is, a properly conducted study should have resulted in *some circumstantial* evidence that would tend to confirm that *theory.*
>
> "The test would have had to be conducted without the infirmities that I have mentioned in regard to the Envirex studies, and *that could have been done.* In fact, *negative results would not have been fatal to* the plaintiffs' case." (App. F-10) (emphasis added)

One would expect from a reading of the Illinois statement of the case that the discharge of fecal waste inexorably leads to the outbreak of disease. But, this is historically false with respect to Milwaukee's discharges in particular, and with respect to sewage discharges generally. The January 1974 *Annual Report Of The Administrator Of The Environmental Protection Agency To The Congress Of The United States In Compliance With Section 26(a) Of The Federal Water Pollution Control Act* at page 12 reflects the extremely tenuous nature of Illinois' contentions:

> "*An assessment of health hazards from polluted water involves considerable uncertainty.* There is little doubt that human feces carry infectious pathogens for a number of intestinal diseases, typhoid fever, hepatitis, brucellosis, encephalities, poliomyelities, psittacosis, and tuberculosis. *However, there are grave uncertainties about the die-off rates of pathogens in natural waters as well as their infectiousness for swimmers or other recreational water users.* Note that the issue of drinking water is not at stake, since its safety depends on disinfection

> treatment by the water supply system. *The evidence that water polluted with fecal matter can transmit diseases to swimmers is sparse and uncertain,* particularly since it has been discovered that swimmers in unpolluted water also have higher incidences of common ear, eye, and nose infections." (emphasis added)

II. Respondents Did Not Stipulate To The Remedy Ordered By The Trial Court; They Stipulated To An Engineering Definition Of What Relief Was Ordered By The Court's Decision.

Fairness also requires comment on the characterization of the remedy ordered by the District Court at pages 10-11 of the Illinois brief. Illinois would have this court believe that Milwaukee "selected" the remedy to be imposed upon it, both from the standpoint of method and timing. Nothing could be farther from the truth. Illinois knows full well that the Judgment Order entered by the District Court was accompanied by a stipulation of the parties that the Judgment Order as agreed to by the parties was the required *mirror image* of the District Court's decision which merely carried out in engineering terms that which the Court had already decided. The stipulation, in relevant part, provides as follows:

> "It is hereby stipulated by and between the parties hereto that the relief necessary to achieve the effluent quality required by the decisions of this court heretofore rendered herein is set forth in the proposed Judgment Order, copy of which is attached.
>
> "This stipulation is entered into for the purpose of presenting to the court the specific engineering solutions, with scheduling and effluent standards, required to carry out the general Findings and Conclusions and the general requirements which this court has imposed on the defendants herein in such decisions. Its sub-

> mission is made to avoid the necessity of adducing extensive expert testimony before the court directed to the same purpose.
>
> * * *
>
> "Other than as set out above, this stipulation is entered into without prejudice to the rights of any of the defendants to appeal from the ultimate judgment entered herein upon any and all grounds ..." (App. E 1-3)

Illinois then in passing states that Milwaukee has recently exposed figures to Illinois that indicate there is really a cost saving in eliminating rather than controlling by-passes and overflows if done by the means of sewer separation (not now permitted under the judgment below) rather than by the convey, store and treat method ordered. A fiscally responsible approach to the massive public expenditures imposed upon Milwaukee by the judgment below has caused the expenditure of millions of dollars and tens of thousands of man hours in an attempt to comply with the judgment below in a cost effective manner. True, the result of this effort may well lessen the total fiscal impact of the judgment. However, study of eliminating by-passes and overflows, as distinguished from *controlling* them, indicates that the costs of elimination exceed those involved for control by sums in the hundreds of millions of dollars, even disregarding the many legal and practical problems which may foreclose the use of some of the less costly methods investigated. The investigative work is ongoing but it is absurd to assert, as Illinois does, that the total elimination of overflows and by-passes can ever be just equal to or even be less than the cost of an environmentally sound cost effective solution. That is why Chicago chose a method which would only "control" rather than "eliminate" overflows and is presently struggling to proceed with the largest public works project in the history of this country to achieve even that presumably cost effective "control" objective. (See text and citations at pp. 19-20 of the Petition for a Writ of Certiorari)

III. Illinois' Arguments On The Merits Are Erroneous, As Well As Inappropriate At This Juncture.

A. The FWPCA Does Not Give Illinois Extra-Territorial Sovereignty To Permit It To Legislate For Wisconsin Discharges.

At pages 16 through 28 of its brief Illinois makes three substantive arguments as though a writ of certiorari had issued rather than addressing whether or not the writ should issue. Nevertheless, all of them are without merit. Illinois begins by asserting that the district court's order on eliminating by-passes is not contrary to the Federal Water Pollution Control Act (FWPCA). Examination of the act against the order reflects the contrary. Illinois' position is based primarily on the preservation of pre-existing rights under FWPCA and the preservation of the right of states to impose more severe limitations *within their own borders* than those imposed by the act. But Illinois does not meet the fact that it has selected *federal common law* as its basis of action and federal common law is controlled by federal statute, a federal statute which with the regulations and permits issued pursuant to it provide for all of the matters in this case. Likewise, Illinois fails to recognize that a right in Illinois to impose more severe limitations on discharges within its borders than those found in FWPCA does not accord Illinois the extra territorial sovereignty to permit Illinois to legislate for Wisconsin discharges.

In this section of its argument, Illinois would draw great comfort from a number of decisions which either deny or refuse to reach preemption of federal common law nuisance claims. Illinois fails to draw attention to the fact that those cases which deny preemption were, like the forerunner of this case in this Court, *Illinois v. City of Milwaukee,* 406 U.S. 91 (1972), decided before FWPCA and the regulations thereunder were the fully operative and pervasive system that they now are. The most significant point, totally missed by Illinois, is that the application of the federal common law of nuisance to interstate waters has its genesis in decisions of this court. Only this court can finally and authoritatively determine and put to rest the

nationally significant issues anticipated by this court to arise from the enactment of a federal statute and regulations of the scope set forth in FWPCA.

The Supreme Court in *Illinois v. Milwaukee, supra,* expressly pointed to the potential preemptive effect of the statute and regulations: "It may happen that new federal laws *and new federal regulations* may in time preempt the field of federal common law of nuisance." (emphasis added) 406 U.S. at 107. Illustrative of other decisions since then are: *Township of Long Beach v. City of New York,* 445 F.Supp. 1203, 1215 (D.N.J. 1978), ["I will therefore deny the motion to dismiss based on preemption without prejudice to a renewal thereof after further clarification of the nature of this suit, the new regulations and their effect on the preemption issue"]. *United States ex rel. Scott v. United States Steel Corp.,* 356 F.Supp. 556, 559 (N.D. Ill. 1973) ["At least until the Environmental Protection Agency has acted effectively, the hands of the plaintiff governments are not tied."]; *United States v. Ira S. Bushey & Sons, Inc.,* 363 F.Supp. 110, 119-120 (D. Vt. 1973), aff'd. mem. 487 F.2d 1393 (2d Cir. 1973), cert. denied, 417 U.S. 976 (1973) [prior to regulations]; *Stream Pollution Control Bd. v. United States Steel Corp.,* 512 F.2d 1036 (7th Cir. 1975) [unnecessary to decide]; *People ex rel. Scott v. City of Milwaukee,* 366 F.Supp. 298, 299-300 (N.D. Ill. 1973) [prior to regulations]; *Reserve Mining Co. v. Environmental Protection Agency,* 514 F.2d 492, 532 (8th Cir. 1975) ["[W]e deem it unnecessary and, indeed, unwise to also rely on federal nuisance law."]. *Committee for the Consideration of the Jones Falls Sewage System v. Train,* 539 F.2d 1006, 1009 (4th Cir. 1976) [states it is an anomaly to allow federal common law to prohibit what a federal permit legitimates]. Two cases cited by Illinois with respect to the preemption of federal common law, *Metropolitan Sanitary Dist. v. United States Steel Corp.,* 30 Ill. App.3d 360, 332 N.E.2d 426 (1st Dist. 1975), cert. denied 424 U.S. 976 (1976) and *People ex rel. Scott v. United States Steel Corp.,* 40 Ill. App.3d 607, 352 N.E.2d 225, 229 (1st Dist. 1976), do not even mention the subject of preemption of the *federal* common law.

B. Like *Missouri v. Illinois*, Illinois' Case Lacks The Evidence Needed To Establish A Federal Common Law Nuisance.

Under its next argument, Illinois' principal reliance is on a statement that the Court of Appeals made an exhaustive analysis of the evidence. Most significantly, Illinois fails to explain the absence of pathogens in Lake Michigan, an evidentiary failure that the district court specifically found, and which was not commented upon by the Court of Appeals. This coupled with the lack of any showing of disease flies in the face of the evidentiary requirements of this Court, reviewed in *Missouri v. Illinois,* 200 U.S. 496, 522-523 (1906) vis:

> "The plaintiff's case depends upon an inference of the unseen. It draws the inference from two propositions. First, that typhoid fever has increased considerably since the change, and that other explanations have been disproved; [No enteroviral outbreaks were shown in the Milwaukee case now before the Court] and second, that the bacillus of typhoid can and does survive the journey and reach the intake of St. Louis in the Mississippi.
>
> We assume the now-prevailing scientific explanation of typhoid fever to be correct. But when we go beyond that assumption, everything is involved in doubt. The data upon which an increase in the deaths from typhoid fever in St. Louis is alleged are disputed. The elimination of other causes is denied. The experts differ as to the time and distance within which a stream would purify itself. No case of an epidemic caused by infection at so remote a source is brought forward and the cases which are produced are controverted."

As Petitioners said in their Petition: "While the evidence before the Court in *Missouri v. Illinois* was strikingly similar to

and considerably stronger than that present here (in the absence of tests that could and should have been performed by plaintiff), the result reached by the Supreme Court is the opposite of that reached by the courts below — the Supreme Court dismissed the case!"

We must note that Illinois also makes what can only be described as a misleading comment on Illinois' discharges to Lake Michigan. Illinois professes that it has eliminated or will eliminate all discharges to Lake Michigan. The record is contrary. Trial Transcript pp. 4026-4034, 13444-13445, 13450; D. Ex. 170 p. 9; GAO, *Report by the Comptroller General of the United States: Combined Sewer Flooding and Pollution — A National Problem. The Search for Solutions in Chicago,* CED-79-77 (May 15, 1979) Vol. 1 p. 18. Additionally, Illinois' regulatory position in respect of all of its *intrastate* waters, where protection of its citizens should be of most serious concern to the State of Illinois, is not commensurate with the level of effluent purification Illinois would impose on Milwaukee at least 25 miles away. It cannot be too strongly emphasized that the Illinois brief makes no response to the undisputed facts appearing at pages 41 through 43 of the Petition for Writ of Certiorari that Illinois does not require of its own citizens the type of conduct it seeks to impose upon Milwaukee. The Illinois approach throughout this case has been and continues to be "Do as we say, not as we do", an approach which this Court condemned more than 70 years ago. See *Missouri v. Illinois,* 200 U.S. at 522 (1906).

In short, the physical facts — no pathogens found in Lake Michigan and no disease occurrence — coupled with Illinois'actions in continuing by-passes of its own sewage and imposing less stringent effluent requirements in its own waters, belie Illinois' evidentiary assertions.

C. This Case Raises Critical Questions Concerning The Reach Of Jurisdiction In A Federal Common Law Nuisance Case.

In the discussion of the jurisdictional positions under its third argument, Illinois fails to address the importance of the question to the governance of trial courts in interstate matters, but rather argues only the substance of the jurisdictional arguments. Again, that substance is not really before this Court at this stage of the proceeding, but the importance of the question presented is central to the question: "should the writ issue?"

This is not a matter of the interpretation and application of an Illinois long arm statute as construed by the Illinois Supreme Court. It is a question of the reach of jurisdiction in a federal common law nuisance case; a case involving interstate waters arising out of a municipal discharge in one state claimed by another state to be violating its rights in the interstate waters. It presents the question of whether an out-of-state municipality can be subject to a federal district court action in the complaining state seeking injunctional relief operating upon the municipality outside the complaining state's geographical jurisdiction.

Swept up in the substance of the issues presented under this head are such questions as whether a federal common law nuisance is a transitory tort; whether a municipality can act extra territorially; and whether venue in this matter can properly be laid outside the district in which the municipality exists and the discharges occur. These questions were, like all the other questions raised in our petition, briefed and argued below and all present important federal questions not definitively addressed by this Court to date with the exception of the venue issue. Petitioners believe that the venue question as dealt with in *Leroy v. Great Western United Corp.*, 61 L.Ed. 2d 464 (1979), ____ U.S. ____, decided by this Court on June 26, 1979, requires dismissal of this action or vacation of the judgment herein and transfer to the Eastern District of Wisconsin. Though Petitioners' position on this point and the *Leroy* case were presented and cited in their Petition, we note with interest

that Illinois devotes one and one half pages of the twelve-page argument in its brief to venue, without once mentioning this latest pronouncement by this Court on the statute directly applicable to this action. In any event, the questions and issues can be expected to occur in the lower federal courts in numerous and important contexts requiring guidance by this Court in the interest of judicial efficiency and harmony.

While Petitioners do not believe that argument of the substance of this case is appropriate until the writ is granted herein, Petitioners could not conscientiously permit the erroneous positions Illinois took in its Brief in Opposition to the Petition herein to stand completely without challenge in the interim. We have therefore in very summary fashion dealt with the most egregious of those erroneous positions. We now address the real question before the Court on the pending petition herein.

IV. A Most Important Federal Question Is Present Here.

At no point in its brief in opposition to the Petition for Writ of Certiorari does Illinois in any way address the basis of the Petition herein, namely, that this case presents, and no more important federal question could be presented than, a federal question which includes:

1. The relationship between federal statutory law and federal common law;

2. The governance of conduct in two or more states affecting the nation's water resources;

3. Fiscal responsibility of a degree presenting possible bankruptcy to communities and refunding hardships to the nation as a whole;

4. The determination of whether all of the issues must be uniformly determined for all of the nation's waters or be subject to *ad hoc,* parochial departures from evenhanded approaches; and

5. The determination of the issue of *in personam* jurisdiction over, and the proper venue for actions dealing with, point source discharges by municipalities.

Illinois' argument in no way detracts from the proposition that all of these factors are present here and that it is of national importance that a definitive answer be given to that question by this Court.

Illinois completely bypasses the entire basis for the Petition herein. Illinois nowhere discusses the five important federal concerns this Court should set at rest. Quite clearly Illinois has chosen not to address the question of whether or not this Court should speak on the national issues here presented, rather Illinois makes only substantive arguments; arguments attempting to persuade this Court that there was no error of substance below. The arguments miss the point that a petition for certiorari and the responsive brief should be directed to why this Court should or should not issue its writ. True enough, the substance of the decisions below will be involved as a setting for that consideration but it is the importance of the federal question presented, not the correctness or incorrectness of the decision below (which can properly be reached only after a full opportunity to brief and consider the issues), which calls for the issuance of the writ. Of critical significance is the fact that, as a matter of law, denial of the writ does not set the questions presented below to rest. It is axiomatic that denial of the writ has no precedential effect. Only through the issuance of the writ herein followed by a full briefing of the substance of this case and decision by this Court will these most important federal questions be set at rest.

CONCLUSION

It is respectfully submitted that the Writ should issue as prayed for in the Petition herein.

Respectfully submitted,

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IN THE
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October Term, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

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INTRODUCTION

This supplemental brief is filed pursuant to Rules 24(5) and 42 of the Rules of the Supreme Court of the United States, and presents the response of petitioners City of Milwaukee, The Sewerage Commission of the City of Milwaukee, and The Metropolitan Sewerage Commission of the County of Milwaukee (collectively, "Milwaukee") to the new, intervening material presented by the Memorandum for the United States as Amicus Curiae with respect to Case No. 79-408.[1]

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[1] Petitioners in Case No. 79-408 are respondents in Case No. 79-571. For the reasons described in Milwaukee's Brief in Opposition to the Petition for Writ of Certiorari filed by the State of Illinois in Case No. 79-571, we agree with the United States that the Court should deny Illinois' petition.

QUESTIONS PRESENTED

Milwaukee respectfully refers the Court to the Questions Presented set out in the Petition for a Writ of Certiorari filed in Case No. 79-408.

STATEMENT OF THE CASE

Milwaukee respectfully refers the Court to the Statement of the Case set out in the Petition for a Writ of Certiorari filed in Case No. 79-408.

ARGUMENT

As stated above, this is in response to the "Memorandum *for* the United States as Amicus Curiae." (emphasis added)

The almost cryptic memorandum filed for the United States tells this Court that the expenditure of the Court's time is not warranted in this case: a case that involves millions of the people of the United States; a case that involves the expenditure of billions of United States and local tax dollars; a case that directly involves, if not the largest local public works project in this country's history, then one of the largest, and establishes the law for like projects to follow; a case decided after the enactment of applicable comprehensive statutory and regulatory provisions which enactment followed the eight-year old decision of *this Court* establishing the basis for this case, which decision of this Court specifically recognized both that this Court's holding was made in the absence of legislation and that the federal common law was subject to displacement by subsequent federal legislation and regulation; a case where liability was imposed by a single federal district judge who admitted his inability to grasp the difficult subject matter but nevertheless imposed liability in the absence of *any* empirical evidence of harm and imposed a remedy without permitting proof of the costs or cost effectiveness thereof; and a case where the Court of Appeals affirmed on the basis that the defendants had failed to prove the very facts that the District Court had not allowed the defendants an opportunity to prove!

Have we really reached the point in this country when this Court should heed the opinion of the executive, as expressed by its attorney, not even its agency charged with environmental concerns or its office of management and budget, that the plea of millions of people being required to expend billions of dollars does not warrant the time of this Court? Note the position of the executive, through its attorney, is a restatement of the identical position before the Court of Appeals taken by Mr. Moorman, the former executive director of the Sierra Club Legal Defense Fund, lead counsel for the United States in the Court of Appeals, and the second ranking attorney for the United States here. The people deserve better treatment from the sovereign — more than the back of its hand administered in the form of a memorandum obviously influenced by an apparent advocate for a position. Milwaukee submits that this case does not merely warrant this Court's attention; the facts of this case make a most eloquent plea for that attention.

Why does the amicus "for the United States" seek to avoid review in the face of the acknowledgement that the issue presented in this case "is not inappropriate for consideration here"? (U.S. Memo. p. 3) Why does the amicus seek to avoid review even as to issues on which the amicus expresses no opinion? (U.S. Memo. p. 7) Of course, politically appointed public officials inherently bring positions on political issues to their job, but they should not be permitted to either use a public office or give the appearance of so doing to discourage review by this Court, sought by and important to the public at large, because they, as individuals, agree with the decision below.

The millions of people of the United States and their billions of dollars are, we believe, more faithfully represented in seeking review by the amicus briefs previously filed for all the major cities and sewer districts in the United States. Continued respect for the law by the public at large is best served through review by the highest authority of a far reaching mandate which imposes perhaps the most economically severe remedy ever imposed by a court. Truer still is this proposition when the mandate operates in a new area of law and is based on conflicting opinions of "experts" only, with absolutely no empirical

evidence of harm. This is not the stuff to cause a common law court in the exercise of nuisance jurisdiction to require so many citizens to reach so deeply into their tax coffers.

In reaching its virtually *ipse dixit* conclusion that the Milwaukee petition for certiorari may appropriately be denied[2], the Memorandum for the United States restates, in strawman form with the hobgoblin label of preemption, *one* of the arguments of the Milwaukee petitioners, then knocks that strawman down and ignores the balance and real substance of the Milwaukee petition.

In the only point it discusses, the Memorandum of the United States asserts that the whole issue as urged by the Milwaukee petitioners is one of total preemption of federal common law by federal legislation. Even a cursory reading of the Milwaukee petition belies that contention. True, the Milwaukee petitioners do set out, as the fact is, that the Congress of the United States has enacted and the Environmental Protection Agency of the United States has adopted pursuant to the Congressional enactment, an overall approach to point source discharges to navigable and interstate waters, which statutes and regulations are a comprehensive scheme for control of discharges that must at the very least guide the courts in applying the federal common law of nuisance to discharges to navigable and interstate waters. To that extent, the position of petitioners resembles a preemption argument. However, central to the Congressional enactment and the regulations adopted thereunder and the common law of nuisance, is the concept that costs and cost effective solutions are of major and even paramount importance to relief regardless of preemption. The statute recognizes costs and cost effective solutions because of the tremendous sums that are involved in these areas and the at-

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[2] As noted above, (footnote 1), we agree that the Illinois petition would appropriately be denied. We presume the United States joins in the reasons expressed in our response to the Illinois petition as the United States does not state the basis for its recommendation in this respect.

tendant resource allocation which must be considered. The common law has always recognized the same issue for particularized application under its doctrines of balancing equities. The District Court and the Court of Appeals specifically ignored costs and cost effective analyses regardless of statute, regulation or common law doctrines.

The Court of Appeals, in affirming the District Court, compounded the error. It first commented that it did not have costs and cost effective information before it on which to consider the position of the District Court, thus totally ignoring the fact that the District Court would not permit that type of evidence to be placed before the court. But of equal importance is the internal inconsistency of the Court of Appeals' positions. On the matter of effluent limitations the Court of Appeals found a lack of evidence and upon that finding held that the lack of proof must result in a denial of relief to the plaintiff. This is, of course, the proper application of the law. The plaintiff failed in its proof, so relief was denied. On the matter of costs and cost effectiveness of relief granted as to overflows, however, the Court of Appeals inverted the burden. Though a nuisance plaintiff is required to prove its right to relief and a comparison of harm to itself against relief imposed which balances in plaintiff's favor as an element of that proof, the Court of Appeals held rather that the absence of such evidence justified the relief accorded to plaintiff.

The entire line of inquiry and policy relating to costs and cost effective remedies, having political ramifications to the United States as a whole and being the subject of Congressional debate and enactment, as well as the proof inversion of the Court of Appeals, has been brushed aside in the Memorandum for the United States by characterizing petitioners' position as being an argument for total preemption. In fact, the District Court refused to follow the political determination by Congress as to the allocation of the nation's resources. The Court of Appeals affirmed that determination because evidence in respect thereof was not present. The Court of Appeals thereby ignored the Congress, common law doctrines and the fact that the

District Court itself caused the lack of that very evidence by refusing to accept it.

In short, as is demonstrated above and in the remaining portions of this response, the Memorandum for the United States fails to recognize the gravity and importance of this case, mischaracterizes the arguments of the petition and phrases them in terms of a pure preemption argument, concludes that the issue of preemption as posed by the Memorandum for the United States was correctly decided below, states that there are no further issues in the case even though issues of *stare decisis*, jurisdiction and venue are all presented and even though recognizing that at least one of the questions presented is "not inappropriate for consideration here" and finally suggests that the petitions for certiorari may appropriately be denied.

The executive arm of the federal government would thus like to displace this Court by saying that the one issue its Memorandum raises and discusses was correctly decided below and therefore no review is warranted. Such position is tantamount to the *executive* determining that the lower federal courts, acting under the federal common law of nuisance, are free to and should totally disregard Congressional enactments, regulations and basic common law doctrines. It is in this vein that the Memorandum for the United States at page 3 states:

> "3. The City's petition presents, *inter alia,* the issue of preemption left open by the court in *Illinois v. Milwaukee, supra.* While that question is not inappropriate for consideration here, *we believe it was correctly decided by the Court of Appeals and,* in the absence of any conflict, we cannot conclude that further review is warranted." (emphasis added)

In essence, the executive would now first determine whether or not correct decisions were made by the Court of Appeals. Based on such determination, the position of the United States as to whether or not this Court should review decisions would be

made. Certainly the appellate judicial function of this Court should not depend on a prereview as to the correctness of decisions on issues below by the executive or on the failure of the executive to express its opinion as to the correctness of other decisions on issues.

After making its single presentation of a created strawman argument, the Memorandum for the United States at page 7 states concerning all "remaining issues":

> "These are matters as to which the United States expressed no opinion in the court of appeals and it seems inappropriate to do so here."

Thus does the United States ignore the jurisdictional and venue issues as well as the numerous other issues raised in the Milwaukee petition. For example, the courts below failed to follow the controlling precedents of this Court in respect of relying on conflicting expert testimony in the absence of demonstrative or empirical evidence, the rule being that conflicting expert witness testimony in such a situation is not sufficient to accord relief in an action alleging an interstate nuisance. (Milwaukee Pet. pp. 33-38.) As to the "remaining issues" not reviewed by the United States, petitioners also rely on their petition.

In the two areas where the Memorandum for the United States argues the authorities for the legal position espoused on the sole issue it discusses, the Memorandum misses the mark.

First, in arguing its manufactured preemption position, the Memorandum relies on the legislative history to show that Congress preserved the federal common law existing before the Clean Water Act (33 U.S.C. §1251). The Memorandum fails to note that the legislative history quoted at footnote 3 on page 4 and 5 was embodied in Senate and House reports made *before* this Court established the existence and applicability of the federal common law to interstate water pollution in *Illinois v.*

Milwaukee, 406 U.S. 91 (1972). The Memorandum then states at page 5 that the Clean Water Act only establishes a baseline of controls and that:

> "The *states* are expressly authorized by Section 510 of the Act, 33 U.S.C. 1350, to adopt and enforce still more stringent controls. (footnote omitted) The *states* also are given primary responsibility for adoption of water quality standards under Section 303 of the Act, 33 U.S.C. 1313." (emphasis added)

This is followed by completing the non sequitur with the conclusion:

> "This, as the court of appeals held (Pet. App. A-17 to A-18), leaves open a continuing role to be played by the *federal* common law of nuisance, not inconsistent with the Clean Water Act." (footnote omitted) (emphasis added)

Thus, the Memorandum relies on legislative history made when the *federal* common law had not yet been established by this Court, and couples that with statutory references to *state* power in an attempt to validate the use below of *federal* common law without regard to *federal* statute.

In the second instance of arguing the authorities, the Memorandum for the United States makes its argument in footnote 5 on page 6. The position taken is that other federal courts have uniformly concluded that the federal common law survives the enactment of the 1972 Amendments "at least as to interstate pollution." At page 7 of our reply brief herein, we reflect the fact that all except two of the cases cited in footnote 5 *did not reach the question* of the effect of the statutes and regulations on the federal common law. The two cases cited at footnote 5 and not discussed at page 7 of our reply brief are *California Tahoe Regional Planning Agcy. v. Jennings,* 594 F.2d 181, 193

(9th Cir. 1979), cert. denied, ____ U.S. ____ (No. 79-15, Oct. 1, 1979), which case was dismissed for failure to state a claim though it did peripherally and without analysis rely on the other cases cited at footnote 5 for the possible existence of a federal common law claim if properly pleaded, and *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975) which case merely cited the Clean Water Act but relied on the Rivers and Harbors Appropriation Act of 1899 (33 U.S.C. §401 et seq.) for its holding.

Certainly these two instances of legal analysis in the Memorandum of the United States are no predicate for a conclusion as to whether this Court should or should not grant review.

We submit that the number of people affected, the dollar commitments involved, the uncertainty of the law, the opportunity for vast amounts of litigation in the area and the overall importance of the subject — interstate relationships to interstate environments and natural resources — clearly warrant the exercise of this Court's appellate review.

CONCLUSION

Milwaukee respectfully prays that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-408

CITY OF MILWAUKEE, ET AL.,
Petitioners,

vs.

STATE OF ILLINOIS, ET AL.,
Respondents.

STATE OF ILLINOIS' OBJECTION TO THE MOTION OF MID-AMERICA LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

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Supreme Court of the United States

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CITY OF MILWAUKEE, ET AL.,

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STATE OF ILLINOIS, ET AL.,

Respondents.

STATE OF ILLINOIS' OBJECTION TO THE MOTION OF MID-AMERICA LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

Pursuant to Rule 42(3) Respondent State of Illinois objects to the motion of the Mid-America Legal Foundation for leave to file a brief as *amicus curiae*. The State of Illinois objects to the motion and has not consented to the filing of the brief for the following reasons:

1. Mid-America is so closely related to the Petitioner City of Milwaukee, that its nominal role as *amicus curiae* creates a serious potential for misleading the Court.

(a) Mr. Henry L. Pitts, Esquire is a founder and current member of the Board of Directors of Mid-America Legal Foundation. Mr. Pitts also represented the Petitioner City of Milwaukee as one of its counsel before the district court below. This close tie between the Petitioner City of Milwaukee and the Mid-

America Legal Foundation has not been disclosed to this Court.

(b) Also on the Board of Directors of Mid-America Legal Foundation are executives of Armco Steel Company and Interlake, Inc., two major dischargers of industrial pollutants into the nation's waterways. If these industrial dischargers wish to have their views known to the Court on the issues presented by the municipal discharger, the City of Milwaukee, they should openly identify themselves and their interests rather than using the guise of a "non-partisan" legal research foundation.

2. In these circumstances, for Mid-America to come before this Court holding itself out as an independent *amicus* seeking only to assist the Court in correctly resolving this case creates a substantial potential for hiding or misrepresenting the interests which Mid-America Legal Foundation and its sponsors actually seek to advance. Under any circumstances, as an *amicus* which is beholden to substantial outside interests, Mid-America stands on a somewhat less favorable footing than one which is independent of such interests. *Universal Oil Company* v. *Root Refining Company*, 328 U. S. 575, 580-581 (1946). Where, as here, that outside interest is actually a party to the litigation, it is unfair and potentially misleading for the movant for *amicus* status to seek to appear at all.

Finally, it is exceedingly doubtful that Mid-America will present anything to this Court that the Petitioner will not or could not set forth in an entirely satisfactory manner. The issues which Mid-America has raised in its brief—the relationship between the common law and the Federal Water Pollution Control Act, and a purported conflict between the Seventh Circuit's decision and prior decisions of this Court on the issue of the correct standard of proof in this case—have been comprehensively briefed by the Petitioner. The *amicus* brief adds nothing. (See Petition for Certiorari at pp. 17-31, 33-41.)

For the reasons stated above, the State of Illinois objects to the motion of the Mid-America Legal Foundation for leave to file a brief as *amicus curiae*.

Respectfully submitted,

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Dated: September 21, 1979.

NOV 13 1979
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

vs. *Petitioners,*

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

RESPONSE OF THE STATE OF ILLINOIS TO THE BRIEFS AMICI CURIAE OF THE MID-AMERICA LEGAL FOUNDATION, THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, THE NATIONAL LEAGUE OF CITIES, THE UNITED STATES CONFERENCE OF MAYORS, AND THE STATE OF WISCONSIN.

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PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

RESPONSE OF THE STATE OF ILLINOIS TO THE BRIEFS AMICI CURIAE OF THE MID-AMERICA LEGAL FOUNDATION, THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, THE NATIONAL LEAGUE OF CITIES, THE UNITED STATES CONFERENCE OF MAYORS, AND THE STATE OF WISCONSIN.

INTRODUCTION.

This supplemental brief is filed pursuant to Rule 24.5 and Rule 42 of the Rules of the Supreme Court of the United States, and presents the State of Illinois' response to the new, intervening material presented by the Amici Curiae in their Briefs in Support

of the Petition for the Writ of Certiorari of The City of Milwaukee, et al. Illinois is filing its supplemental brief at this time, as it now appears that all Amici have filed their arguments.

STATEMENT OF THE CASE.

The State of Illinois respectfully refers this Court to the Statements of the Case set out in the Brief of the State of Illinois in Opposition to the Petition for a Writ of Certiorari, and in the State of Illinois' Petition for a Writ of Certiorari (79-571), both of which have previously been filed with this Court.

QUESTIONS PRESENTED.

The State of Illinois respectfully refers this Court to Questions Presented in the Brief of the State of Illinois in Opposition to the Petition for a Writ of Certiorari and in its Petition for a Writ of Certiorari (79-571), both of which have been previously filed with this Court.

ARGUMENT.

I.

THE ORDER OF THE DISTRICT COURT IS CONSISTENT WITH THE PROVISIONS OF THE CLEAN WATER ACT.

A.

Introduction.

The Amici contend that this Court should grant certiorari in order to stabilize an area of unsettled law, i.e., the relationship between the common law of nuisance and the scheme of the Clean Water Act in correcting discharges of raw sewage. The heart of their contention is, that although raw sewage which enters a treatment plant must be treated, raw sewage which is discharged from the pipe prior to reaching the treatment plant need not be treated. This flies in the face of the Court of Appeals' statement that:

> "It is doubtful whether anyone, layman or expert, would argue that the discharge of raw sewage into public waters is a satisfactory alternative to collection and treatment. . . ." Appendix A-34[1]

Their arguments in support of their contention take a number of forms:

1. The Association of Metropolian Sewerage Agencies, et al. (hereinafter called "AMSA") and Mid-America Legal Foundation argue that the common law ought to be discarded in favor of determinations to be made by purported experts in the federal bureaucracy. The

---

1. The Court of Appeals noted that even defendants' officials and consultants agreed that the raw sewage overflows were not an acceptable long term alternative. (*Id.*)

Court of Appeals in this case and other courts have uniformly rejected this argument.

2. Wisconsin argues that the Clean Water Act has preempted the federal common law of nuisance. In fact, the Clean Water Act expressly preserves common law remedies.
3. AMSA also argues that granting a permit should insulate the permittee from common law actions. But case law is almost unanimous in holding that a permit is not a defense to a charge of public nuisance.
4. Finally, AMSA argues that the Court of Appeals should have followed the scheme of the Clean Water Act and reversed the District Court's order eliminating overflows, and directed the District Court to consider cost-effective remedies. But that is exactly what the Court of Appeals did here. The Court of Appeals noted the requirement that sewage discharges from publicly owned treatment works (POTW) meet the secondary treatment effluent limitations of § 301(b)(1)(B). Since § 212 of the Act defines treatment works for federal grants to include sewers (both combined and separate), the Court simply applied the logic of the statute. See Appendix A-10 through 13. Moreover the District Court's order, affirmed by the Court of Appeals, allows Milwaukee to select the most cost-effective alternative of eliminating the raw sewage overflows.

B.

An NPDES Permit Issued Under the Clean Water Act Does Not Bar Common Law or State Statutory Action for Relief Against Water Pollution.

The municipal dischargers (AMSA) and other Amici raise an argument that has been repeatedly raised by polluters and rejected by the courts. Basically the municipal dischargers want

EPA to be the exclusive entity to determine the timing—and more importantly, the degree—of pollutant clean-up by dischargers. These dischargers want no independent role for state attorneys general, for states attorneys or for any other public or private entity who may be injured or aggrieved by pollution created under the protective umbrella of an EPA NPDES permit.

This basic argument of exclusivity has taken on a number of legal guises: preemption, exhaustion of administrative remedies, primary jurisdiction, deference to agency "expertise", the permit as a bar to more stringent remedies, etc. The Attorney General of Illinois has faced this argument repeatedly in suits brought by the Attorney General's office against intrastate and interstate polluters. On several occasions, major polluters of Lake Michigan have worked out "consent" decrees or consent permits with the state administrative agency or EPA while the Attorney General's case was on trial and near judgment. Indeed, in some of those cases, the Attorney General has been faced with lenient pollution control permits from the Illinois state agency. In all of these cases, the right of the Attorney General or local government to sue for tighter controls under common law or statutory authority has been upheld. *People ex rel. Scott* v. *United States Steel Corp.*, 40 Ill. App. 3d 607, 352 N. E. 2d 225, 228-29 (1976); *Metropolitan Sanitary District* v. *United States Steel Corporation*, 30 Ill. App. 3d 360, 332 N. E. 2d 426, 432-33, *appeal denied*, 60 Ill. 2d 597 (1975), *cert. denied*, 424 U. S. 976 (1976).[2] *See, State* v. *Dairyland Power Cooperative*, 52 Wis. 2d 45, 187 N. W. 2d 878, 880-81 (1971); *Costas* v. *City*

2. It is mildly ironic that one of the leading cases upholding the right of local governments to seek stronger relief was brought and successfully prosecuted by the pollution control arm of the Metropolitan Sanitary District of Chicago, one of amicus AMSA's principal members. Compare *Metropolitan Sanitary District* v. *United States Steel Corporation, supra,* with the position taken by AMSA here. The Attorney General of Illinois co-prosecuted that case with the Sanitary District to protect Chicago's water supply from steel mill discharges in Indiana.

of Fond du Lac, 24 Wis. 2d 409, 129 N. W. 2d 217, 220 (1964); *Commonwealth ex rel. Schumaker* v. *New York and Pa. Co.,* 367 Pa. 40, 79 A. 2d 439, 445 (1951); *State ex rel. Shevin* v. *Tampa Electric Co.,* 291 So. 2d 45, 47-48 (Fla. App. 1974). *See also, Baltimore & Potomac R. Co.* v. *Fifth Baptist Church,* 108 U. S. 317, 334-35 (1883). See opinion below, Appendix A-6 to A-20.

AMSA relies on the solitary case of *Potomac River Association, Inc.* v. *Lundeborg Maryland Seamanship School, Inc.,* 402 F. Supp. 344 (D. Md. 1975), which is inapplicable here. That case involved dredging and filling under a valid permit issued by the Corps of Engineers under Section 10 of the Rivers and Harbors Act of 1899. The Rivers and Harbors Act of 1899, unlike the Clean Water Act, does not expressly preserve private rights of action. Section 505(e) of the Clean Water Act, 33 U. S. C. § 1365(e), expressly states that the grant of standing under § 505 shall not "restrict any right which any persons (or class of persons) may have under any statute or common law. . . ." As set out in more detail in Illinois' Brief in Opposition, the legislative history makes it clear that common law actions are to be preserved.

C.

The Remedy Approved by the Court of Appeals Is Wholly Consistent with the Clean Water Act.

The Court of Appeals followed the scheme of the Clean Water Act when it held that Milwaukee was required to collect and treat all of its sewage including that now discharged from its sanitary sewer and combined sewer overflows. The Appellate Court recognized the logical inconsistency in requiring treatment of sewage which reaches the treatment plant, while allowing sewage discharges from the pipe upstream to go untreated. Appendix A-34. The Court of Appeals noted that Congress required publicly owned treatment works to achieve secondary treatment by July 1, 1977. Appendix A-21. Treatment works

include interceptor sewers, outfall sewers, sewage collection systems, and systems to dispose of stormwater runoff. Clean Water Act § 212(2), 33 U. S. C. § 1292(2).

The Court of Appeals' decision is also consistent with the statutory scheme of the Clean Water Act to the extent that the Act calls for least cost alternatives of pollution control. In its brief, AMSA argues that Congress, in the Clean Water Act, considered cost effectiveness a key ingredient in the development of an overflow correction strategy. AMSA Brief at 13. The State of Illinois agrees that Milwaukee ought to employ the least cost alternative to collect the raw sewage for treatment. The order of the District Court, affirmed by the Court of Appeals, provides for modification of the judgment order to allow lower cost methods of sewage collection to be installed if Milwaukee can establish that such methods are feasible. Appendix D-4.

II.

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE DISTRICT COURT'S FINDINGS OF FACT WERE NOT CLEARLY ERRONEOUS.

A.

Introduction.

The Amici contend that both lower courts erred in holding that the plaintiff must prove its case by the preponderance of the evidence, rather than by the stricter standard of clear and convincing evidence. The logic behind the clear and convincing standard is inapplicable in the case at bar. The correct standard is preponderance of the evidence.

B.

The Circuit Court Applied the Correct Standard of Proof.

As a preliminary matter, both the District Court and the Court of Appeals found that the correct standard of proof to

apply in this case was preponderance of the evidence. Appendix A-26; F-3. But both courts stated that either standard, preponderance of the evidence or clear and convincing evidence, would produce the same result. *Id.*

The setting of a higher standard of proof in cases involving certain equitable relief has clearly defined historical justification. In *Mugler* v. *Kansas,* 123 U. S. 623 (1887), Justice Harlan stated that equity will not restrain a nuisance "except upon clear and convincing evidence that one exists." 123 U. S. at 673. What Justice Harlan referred to was the historic equity practice of withholding preliminary injunctive relief in cases of conflicting evidence. Equity's jurisdiction originally was limited to preliminary relief pending a decision on the controversy at law.

Public nuisance cases were originally criminal actions. The offender was indicted, tried by a jury, and, if convicted, ordered to abate the nuisance. In equity, the chancellor intervened only when "there was imminent danger of irreparable msichief before the tardiness of the law could reach it." *City of Georgetown* v. *The Alexandria Canal Company,* 37 U. S. (12 Pet.) 91, 98 (1838). Chancellors were reluctant to intervene because they sat without a jury and, before 1900, they did not hear and observe witnesses, but received testimony in the form of depositions. Therefore equity intervened only where the evidence was "determinate and satisfactory." 2 *Story's Equity Jurisprudence* §§ 1251, 1252 (14th Ed. 1918). *See, Missouri* v. *Illinois,* 180 U. S. 208, 248 (1901). Courts of equity intervened only prior to an action at law. If the evidence was not clear and convincing, then the action was heard in a court of law:

> "If the legal right is doubtful the practice appears to be to leave that question to trial at law."
>
> 2 *Story's Equity Jurisprudence* § 1250 n. 4

However, once the question of liability was determined at law, an abatement order was entered. Concepts of irreparable harm, imminent danger, the need for "clear and convincing evidence," all went to the issue of Equity's intervening prior to trial on the merits at law. Now that law and equity have merged, and the trial judge who sits as the chancellor also sits as the trier of fact, there is no justification for the rule. While these limitations may still be appropriate when granting preliminary injunctive relief prior to trial, they certainly do not apply to a decision made after a full trial on the merits.

The clear and convincing requirement may have another function in the original jurisdiction cases before this Court. This Court appears to have applied the clear and convincing standard of proof to discourage exercise of its original jurisdiction. This reasoning is reflected by this Court's statement in *Missouri* v. *Illinois,* 200 U. S. 496 (1906).

> "Before *this* Court ought to intervene the case should be of serious magnitude, clearly and fully proved. . . ."
>
> 200 U. S. at 521 (emphasis added)

In *Ohio* v. *Wyandotte Chemicals Corp.,* 401 U. S. 493 (1971), Justice Harlan indicated that had Ohio's nuisance action been brought under the Court's original jurisdiction, it would have been subject to an "unusually high standard of proof." 401 U. S. at 501 & n. 4.

The Amici ask this Court to extend an unusually high standard of proof to civil cases at the district court level. None of the reasons which supported application of the clear and convincing standard of proof in cases between states, brought as original actions before this Court prior to the merger of law and equity, would support extending this standard to the case at bar.

The Circuit Court was also correct in holding that the evidence in the District Court was sufficient to prove the existence of a public nuisance. As discussed above, this Court, in *Missouri* v. *Illinois,* 200 U. S. 496 (1906); *New York* v. *New Jersey,*

256 U. S. 296 (1921); *North Dakota* v. *Minnesota,* 263 U. S. 365 (1923), employed a vastly higher standard of proof, inapplicable in the instant case. In *Missouri* v. *Illinois,* and *New Jersey* v. *New York,* this Court noted that the plaintiffs' own discharges were sufficient to create the hazard of which they complained, and therefore found that the defendants were entitled to demand "strictest proof" that they were the cause of any increased incidence of disease. 200 U. S. at 521-23; 256 U. S. at 303. In *North Dakota* v. *Minnesota,* this Court found not only that North Dakota failed to meet the clear and convincing standard but that,

> "The experts called by Minnesota in this case seemed to us to use more specific and accurately ascertained data for their estimates than those from North Dakota, and this circumstance, as well as the more satisfactory reasons given, lead us to think that their conclusions are more to be depended upon."
>
> 263 U. S. at 386.

In the instant case, the District Court also commented extensively on the credibility of each of the parties' witnesses. Appendix F-4 to F-6; F-8 to F-10; F-18; F-20. But here, unlike *North Dakota* v. *Minnesota,* the conclusions of the experts favored the plaintiff.

The Amici imply that the Court of Appeals should have ignored the clearly erroneous standard of Rule 52, Fed. R. Civ. P. Likewise they assert that this Court should review and reexamine the evidentiary findings of the District Court. This Court is loath to review findings of fact in which the Appellate Court has concurred. *Goodyear Tire and Rubber Co.* v. *Ray-O-Vac Co.,* 321 U. S. 275, 278 (1944).

III.

THE LAW DOES NOT PERMIT A PUBLIC HEALTH HAZARD TO PERSIST ON A CLAIM OF ECONOMIC INCONVENIENCE.

The Amici contend that equity requires consideration of costs. Although this may be true for wholly economic injuries, *City of Harrisonville* v. *W. S. Dickey Clay Mfg. Co.*, 289 U. S. 334, 339 (1933), the rule does not apply here, where considerations of public health are involved. *Harrison* v. *Indiana Auto Shredders Co.*, 528 F. 2d 1107, 1122 (7th Cir. 1976); *Commonwealth ex rel. Schumaker* v. *New York and Pennsylvania Co.*, 367 Pa. 40, 79 A. 2d 439, 444 (1951); *People ex rel. Stream Control Commission* v. *City of Port Huron*, 305 Mich. 153, 9 N. W. 2d 41, 43-44 (1943); *Board of Commissioners of Ohio County* v. *Elm Grove Mining Co.*, 122 W. Va. 442, 9 S. E. 2d 813, 817 (1940).

Moreover, the District Court addressed costs in its order. Appendix F-28. Defendants' own expert, Heaps, estimated that the total project cost would be less than $6.00 per household per month *without federal assistance*. Gordon Culp, a nationally known engineering expert, estimated that advanced wastewater facilities would cost $1.80 per household per month. But even where costs were more severe, courts have required states to engage in substantial expenditures to protect the legal rights of neighboring states. As this Court stated in *Wisconsin* v. *Illinois*, 289 U. S. 395 (1933), when it ordered Illinois to build expensive sewage treatment plants rather than diverting large amounts of water, a less expensive alternative which would have harmed Wisconsin,

> "Despite existing economic difficulties, the State has adequate resources, and we find it impossible to conclude that the State cannot devise appropriate and adequate financial measures to enable it to afford suitable protection to its people to the end that its obligation to its sister States, as adjudged by this Court, shall be properly discharged."
>
> 289 U. S. at 410

IV.

MISCELLANEOUS.

A.

The Amici's Claim That the Court of Appeals' Decision Will Result in a Flood of Litigation Is Wholly Unfounded.

The Amici make the worn and tattered argument that the Court of Appeals' decision here will initiate a flood of litigation against municipalities and municipal sewerage agencies, which will result in unpredictable pollution control costs. There is no historical support for this claim.

The "floodgates" of litigation under the federal common law of nuisance opened in 1972 when this Court announced that the federal common law of nuisance applied to interstate pollution. But the cases passing through them have amounted to less than a trickle. Other than *Illinois* v. *City of Milwaukee,* now before this Court, only two cases have been filed in which plaintiffs relied solely or primarily on the federal common law to support their claims. *California Tahoe Regional Planning Agency* v. *Jennings,* 594 F. 2d 181 (9th Cir. 1979); *Byram River* v. *City of Port Chester,* 394 F. Supp. 618 (S. D. N. Y. 1975).

B.

The District Court Was Not Required to Defer to a Compromise Reached in and Approved by a Wisconsin State Court.

The Amicus, State of Wisconsin, urges that the District Court should have deferred to the judgment of its state district court. This is an incredible argument. This Court has held that Illinois does not have to lower itself to the more degrading standards of a neighbor. *Illinois* v. *City of Milwaukee,* 406 U. S. 91, 107 (1972).

The "judgment" Wisconsin refers to is nothing more than a hollow agreement reached by Milwaukee and the Wisconsin

Department of Natural Resources and approved by the court. The agreement lacks provisions necessary to protect the health of Illinois residents.

No questions of comity are involved here. Nothing in the *Milwaukee* judgment will prevent Wisconsin from enforcing the order of its state court. What Wisconsin asks is that this Court allow Milwaukee to conform to standards set out in a settlement in which Illinois did not participate, standards which are not as strict as those which the District Court found were necessary to protect Illinois residents, standards which would allow Milwaukee to continue its past practice of creating a public nuisance.

CONCLUSION.

For the foregoing reasons, the briefs of the Amici Curiae fail to raise issues of such paramount importance as to warrant granting Milwaukee's Petition for a Writ of Certiorari.

Respectfully submitted,

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November 13, 1979.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, THE NATIONAL LEAGUE OF CITIES AND THE UNITED STATES CONFERENCE OF MAYORS AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI OF THE CITY OF MILWAUKEE, ET AL.

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE ON BEHALF OF THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, THE NATIONAL LEAGUE OF CITIES AND THE UNITED STATES CONFERENCE OF MAYORS

The Association of Metropolitan Sewerage Agencies, on its own behalf and on behalf of the National League of Cities and the United States Conference of Mayors, moves the Court for leave to file the attached brief amici curiae in the above-entitled case, and in support thereof states:

1. The Association of Metropolitan Sewerage Agencies is a non-profit association of 67 large municipal and metropolitan sewerage agencies. Its member agen-

cies have responsibility for management of most of the nation's largest municipal liquid waste treatment facilities, serving a combined population of 64 million people.

The National League of Cities is an Illinois not-for-profit corporation organized in 1933 to assist municipalities in performing their functions. Its membership includes direct member cities, state municipal leagues and state league member cities. In all, almost 15,000 cities and municipalities, both the largest and the smallest, are members of and participate in the activities of the National League. There are no more essential and ubiquitous participants in the nation's waste water treatment efforts than the cities, towns, villages and boroughs which must design, construct, maintain, operate and pay for a major portion of the water and sewerage facilities of the nation.

The United States Conference of Mayors is an organization of city governments represented through their chief elected officials, Mayors. It was organized in 1933 to promote the causes of the city, to foster responsible and effective relationships between city halls and the federal government, and to assist local governments in their responsiveness to the needs of their citizens. Municipalities and governmental entities, approximately 800 of which are represented by the U.S. Conference of Mayors, have major responsibilities for liquid waste treatment throughout the nation.

2. The members of these three organizations have taken steps, including planning, constructing and financing waste treatment facilities to meet the limitations on discharge of liquid wastes established by Congress in the Federal Water Pollution Control Act of

1972, as amended, 33 U.S.C. 1251-1376, and by the implementing regulations issued by the Environmental Protection Agency, 40 C.F.R. Part 133.

3. The decision of the Seventh Circuit Court of Appeals, in upholding relief to the plaintiff States based on principles of federal common law, grants far different and more stringent relief against the municipal defendants than that established by Congress and the Environmental Protection Agency.

4. The decision below has far-reaching consequences for municipalities, many of whom could be vulnerable to suit if it should be established that states are able to seek relief under federal common law for discharges of effluents into navigable waters at levels that are permitted and deemed acceptable under the comprehensive scheme for water pollution control enacted by Congress. The significance of this case goes far beyond the interests of the parties, with important implications for the entire national effort to abate and control water pollution from municipal sources. For this reason it is important that the Court understand fully the impact the case could have as it evaluates the specific contentions of the parties with respect to whether a Writ of Certiorari should be granted.

5. This case presents important issues of law of direct concern to the members of the amici curiae organizations:

a. Does the federal common law of nuisance survive with respect to public discharges of effluents otherwise permitted under the federal statutory scheme?

b. If so, what are the appropriate parameters to guide the lower courts in determining that public nui-

sances exist and in fashioning remedies to be applied against public waste treatment agencies to remedy the nuisances?

While these issues will be addressed by the parties, the national perspective which the amici organizations can bring is broader than the interests of the parties.

6. Accordingly, the amici curiae seek this opportunity to make known their views to the Court and to attempt to assist the Court in determining whether the issues presented by this case are sufficiently important to justify granting a Writ of Certiorari.

7. Consent has neither been sought nor obtained from the parties for the filing of a brief amicus curiae by the aforementioned organizations.

Respectfully submitted,

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On Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

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BRIEF OF THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, THE NATIONAL LEAGUE OF CITIES, AND THE U.S. CONFERENCE OF MAYORS AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI OF THE CITY OF MILWAUKEE, ET AL.

INTRODUCTION AND LIST OF AMICI CURIAE

The three organizations joining in the submission of this brief represent municipal entities and officers who have major responsibilities for water pollution control and treatment across the nation. The Association of Metropolitan Sewerage Agencies is a non-profit corporation organized under the laws of, and located in, the

District of Columbia. Founded in 1969, the Association represents 67 large metropolitan sewerage agencies responsible for the construction and management of liquid waste treatment facilities. The Association's member agencies serve a combined population of approximately 64,000,000 people.

The National League of Cities is an Illinois not-for-profit corporation organized in 1933 to assist municipalities in performing their functions. Its membership includes direct member cities, state municipal leagues and state league member cities. In all, almost 15,000 cities and municipalities, both the largest and the smallest, are members of and participate in the activities of the National League. The activities of the League as authorized in its By-laws include "the safeguarding of the interests, rights, and privileges of municipalities". It is in this capacity that the League offers its views in the case at bar. There are no more essential and ubiquitous participants in the nation's waste water treatment efforts than the cities, towns, villages and boroughs which must design, construct, maintain, operate and pay for a major portion of the water and sewage facilities of the nation.

The United States Conference of Mayors is an organization of city governments represented through their chief elected officials, Mayors. It was organized in 1933 to promote the causes of the city, to foster responsible and effective relationships between city halls and the federal government, and to assist local governments in their responsiveness to the needs of their citizens. Municipalities and governmental entities, approximately 800 of which are represented by the U.S. Conference of Mayors, have responsibility for management

of most of the nation's large municipal liquid waste treatment facilities serving most of the nation's population. As the national organization of the nation's mayors, the United States Conference of Mayors is uniquely suited to bring to the attention of this Court the perspective of the larger cities of America on this litigation.

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

The consent of all parties not having been obtained, a motion for leave to file this brief has been presented to the Court contemporaneous with the presentation of this brief pursuant to Rule 42 of the Rules of this Court.

STATEMENT OF THE CASE

We respectfully refer the Court to the Citation of Opinions Below, the Statement of Jurisdiction, the Citation of Statutory Provisions Involved, and the Statement of the Case presented in the Petition for Writ of the City of Milwaukee, et al. filed with the Court in this proceeding.

QUESTIONS PRESENTED

I. Where a municipality discharges waste water into interstate waters pursuant to a permit issued under the comprehensive body of federal water pollution control statutes and regulations, should the municipality remain subject to suit based on the federal common law of nuisance for those same discharges?

II. If the federal common law of nuisance survives with respect to municipal discharges authorized by permit, may trial courts base a finding of nuisance on

any standard of proof less demanding than clear and convincing evidence?

III. If a nuisance is established under the federal common law with respect to municipal discharges, may trial courts fashion a remedy without reference to the framework of federal statutory policies and without regard to considerations of cost?

INTEREST OF AMICI CURIAE

The amici curiae are organizations of municipal entities and officers with a substantial interest in the questions presented for review. The amici and many of their members have participated actively in the development of the comprehensive body of federal legislation and regulation relating to water pollution control. Representatives of the amici have testified before Congressional committees during consideration of both the Federal Water Pollution Control Act of 1972, PL 92-500, and the Clean Water Act of 1977, PL 95-217. 33 U.S.C. §§ 1251-1376. The amici have also participated actively in many of the rulemaking proceedings pursuant to these Acts. 40 C.F.R. Parts 100-149.

More importantly, members of the amici organizations shoulder the major responsibility for implementing the ambitious program of water pollution control being undertaken across the nation in response to the federal legislation. Cities, towns, municipal sewerage agencies and specially created sanitary districts are involved in all aspects of the planning, design, financing, construction, and operation of waste water treatment facilities.

The decision of the Court below has enormous and far-reaching implications for municipalities. Literally

thousands of towns have made political, engineering and financial decisions with respect to waste treatment in reliance on the comprehensive body of federal statutory and regulatory law which emanates from the 1972 and 1977 Acts and which now governs the waste water treatment field. If the decision of the Court below is permitted to stand, the course taken by local agencies will be cast in doubt. If actions to enjoin water pollution based on the federal common law of nuisance will lie against public agencies holding valid discharge permits issued under the federal statutory scheme, these agencies will face the prospect of entirely different treatment standards being set according to the vagaries of litigation. Countless suits will be encouraged, and the standards developed by courts will not be known until long after key decisions have been made and funds committed for those treatment modes now required by federal statute and regulations.

If federal courts may prescribe treatment standards far more stringent than Congress has required—total elimination of combined sewer overflows, for example —municipalities will be faced with financial obligations far in excess of current capacity and expectations, and for which federal financial assistance will not be forthcoming.

If courts may order abatement above and beyond that required by statute on the basis of the relatively relaxed standard of proof applied below, and if courts may fashion remedies without regard to considerations of cost and efficiency, similarly situated communities across the country can be expected to face radically different waste treatment obligations.

For all of these reasons, issues litigated in this case go far beyond the interests of the nominal parties. In light of the national implications of this case and the errors committed below, the Court should grant the Writ and review this case on the merits.

ARGUMENT

1. Permits Validly Issued Pursuant to the Federal Statute and Regulations Should Immunize Municipalities from Nuisance Suits Based on Discharges Authorized by Those Permits.

The amici curiae support the position taken by Milwaukee in its Petition that the time has come for the Supreme Court to recognize the comprehensive nature of the federal statutory and regulatory scheme designed to control both intra- and inter-state water pollution. At a minimum, federal courts should be precluded from finding common law nuisances where the activity complained of is authorized by a permit issued under the federal program.

The amici commend to the Court both the reasoning and the result of a recent decision in the Federal District Court for the District of Maryland, *Potomac River Association, Inc., et al.* v. *Lundeberg Maryland Seamanship Schools, Inc.*, 402 F. Supp. 344 (1975). That case involved activities authorized by "dredge and fill" permits issued by the Corps of Engineers under § 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403. The Court held that permits validly issued pursuant to that act would immunize from complaint activities which might otherwise be considered nuisances under the common law. It stopped short of total preemption with respect to the entire field, but limited the nuisance remedy to dredge and fill activities outside the scope of the federal permit.

We submit that municipal waste water treatment permits should be similarly respected. This Court has already implied, in its earlier consideration of the instant controversy, that the federal statutory law might evolve so as to pre-empt the federal common law of nuisance with respect to water pollution. *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972). Since that opinion, there has been a substantial expansion in both the scope and detail of the regulatory scheme. Both the 1972 and 1977 Acts are landmarks in this expansion. The myriad body of regulations issued pursuant to these Acts bears further witness. Indeed, courts sustaining the common law of nuisance subsequent to passage of the 1972 Act have been careful to rely, at least in part, on the incomplete implementation of that Act as grounds for avoiding the pre-emption question. *United States ex rel. Scott* v. *U.S. Steel Corp.,* 356 F. Supp. 556 (N.D.Ill. 1973), *Stream Pollution Control Board of Indiana* v. *U.S. Steel Corp.,* 512 F. 2d 1036 (7th Cir. 1975).

Given the increasingly comprehensive nature of the federal statutory and regulatory scheme, the technical complexity of the issues involved, and the enormity of the public expenditures required to implement various waste treatment strategies, we agree with Petitioners that the time has come for Executive Branch agencies with their attendant staffs and expertise, not the federal courts, to make detailed decisions in this area. At the very least, when these decisions result in the issuance of discharge permits, and affected parties choose not to challenge those permits in the administrative and judicial forums available to them for review of those decisions, this Court should declare the nuisance remedy to be obsolete.

2. If the Common Law Nuisance Action Survives, this Court Should Set Strict Parameters on Its Use and Development by the Lower Courts.

Should the Court disagree with the fundamental proposition outlined above, it should still grant Certiorari for the purpose of establishing more precisely the parameters within which the federal common law of nuisance shall operate in this area. While straining to preserve the common law action, the Court below has failed to apply to the facts of the controversy traditional considerations of the common law of nuisance.

As the doctrine is applied in the lower courts today, nuisance remains primarily an action to protect one person's or class's property rights when they are allegedly invaded by the conduct of another. It has more to do with the former rights than the latter conduct, and in today's complex world, property rights are certainly relative, not absolute. The reasonableness of the conduct, taking into account all the circumstances, must be judged and balanced against the importance of the property interests which seek protection. *Boccardo* v. *United States,* 341 F. Supp. 858 (N.D. Cal. 1972). The reasonableness test remains appropriate where the nuisance complained of is environmental in nature. *Harrison* v. *Indiana Auto Shredders Co.,* 528 F.2d 1107 (7th Cir. 1976). The potential for injury and inconvenience to defendants, along with corrective expenditures undertaken by defendants to lessen the impact on plaintiffs, should be weighed in the balance. *Stockdale* v. *Agrico Chemical Co., Division of Continental Oil Co.,* 340 F.Supp. 244 (N.D. Iowa 1972), *Daigle* v. *Continental Oil Co.,* 277 F. Supp. 875 (W.D. La. 1967). While much of the case law has been generated by pri-

vate litigants, much of the reasoning behind these principles should apply equally to suits between public entities. Where policy considerations dictate divergent standards, it is incumbent upon this Court to define where, why and to what extent that should be the case.

If the decision below is left standing, other federal courts will be free to operate with few constraints in direct competition with the Congress and the Executive as the arbiters of municipal waste treatment responsibilities. At a minimum, this Court should establish strict standards of proof to be applied and clarify the degree to which fundamental policies of the federal statutory scheme should guide the prescription of common law remedies in the lower courts.

3. The Court Below Erred in Applying a Preponderance of the Evidence Test in a Nuisance Case Involving Competing Public Interests.

If the standard of evidence actually applied by the Court of Appeals in this proceeding is difficult to discern, it was certainly characterized as more relaxed than that which Supreme Court predecent requires. On repeated occasions this Court has placed a heavy burden on states to prove with "clear and convincing evidence" the existence of an inter-state nuisance. The landmark case, *Missouri* v. *Illinois,* 200 U.S. 496 (1906) is fully analyzed in Milwaukee's Petition, and we will not duplicate that briefing here. A later case, *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230 (1907), appeared to adopt a "preponderance of the evidence" test, although even there the Court purported to follow the dictates of *Missouri.* However, if *Georgia* introduced any ambiguity, subsequent cases on point unmistakably reinstate the "clear and convincing" standard.

New York v. *New Jersey,* 256 U.S. 296 (1921), *North Dakota* v. *Minnesota,* 263 U.S. 365 (1923).

We strenuously object to both the reasoning and the outcome of the Seventh Circuit's opinion as it concerns the appropriate standard of evidence to be applied in a case of this nature. The Court below relied upon cases involving private party defendants, *Georgia* v. *Tennessee Copper, supra,* and *Ohio* v. *Wyandotte Chemicals Corp.,* 401 U.S. 493 (1971), to arrive at the conclusion that a preponderance of the evidence was the appropriate standard of proof (Appendix at A-25 and 26). The Seventh Circuit would attach great significance to the fact that the defendants in the instant action are not sovereign states, and that the action has been tried in a federal trial court, as opposed to in the Supreme Court as a matter of original jurisdiction.

We think more appropriate considerations are the public interests to be assessed. The additional financial obligations imposed on Milwaukee by the lower courts will have to be met, at least in large measure, by municipal taxpayers. In addition, federal and state taxpayers may eventually share a portion of the ultimate costs. We are at a loss to understand why the lower courts would wish to allocate substantial tax burdens with no more convincing evidence than they might find sufficient to assess costs against an industrial polluter. And further, while a trial at the District Court level may relieve the Supreme Court of some analytical burden, we do not think this Court would want the lower courts to lightly impose enormous financial obligations in an arena so thoroughly permeated by public interest considerations. While we are not prepared to argue that this problem rises to the stature of a politi-

cal question, we think this Court would wish the federal judiciary to wear the hat of municipal tax assessor in only the most compelling of circumstances.

Because of the substantial burdens federal courts could impose upon municipalities if they are to enjoin activities otherwise authorized by the federal regulatory scheme, this Court should make clear that those remedies are to be considered only where the nuisance has been established in the first instance under the most exacting standard of evidence appropriate to a civil action.

On the face of the Seventh Circuit's opinion, it is difficult to determine why the Court found the evidence (expert witness testimony) in support of the portions of the trial court decision upheld convincing. As amply demonstrated in Milwaukee's Petition, the "proof" relied upon is sufficiently conclusory in nature to justify this Court in looking behind the findings of the lower courts to examine their foundation. *Baumgartner* v. *United States,* 322 U.S. 665 (1944). Such examination might well establish that the evidence in this case does not even rise to the standard of proof adopted by the Court of Appeals.

4. The Court Below Erred When It Required Total Elimination of Combined Sewer Overflows and Ignored Cost and Funding Considerations.

This Court has already recognized in this case that common law rights and remedies should serve the policies enunciated in federal statutory law. *Illinois* v. *Milwaukee, supra,* note 5, at 103. See also *Textile Workers* v. *Lincoln Mills of Alabama,* 353 U.S. 448 (1957).

This Court should not be misled. The permit standards imposed under the federal statute are exceedingly ambitious goals, compliance with which represents an enormously expensive national undertaking. While estimates vary considerably, and some are far more staggering than others, the Senate Committee with jurisdiction over the federal water pollution control program estimated in 1977 that the construction still needed to achieve municipal compliance with the standards set by the 1972 Act would cost in excess of $60 billion. S. Rep. No. 370, 95th Cong., 1st Sess. 2, reprinted in [1977] U.S. Code Cong. & Ad. News 4328. Despite an original authorization in the 1972 Act of $18 billion, by 1977 only approximately one-third of the nation's municipal treatment plants had achieved compliance with the standards required for construction and operations in 1977. More than 92 million persons were still served by municipal treatment plants that could not meet the statutory standards. 123 Cong. Rec. S.19646 (daily ed. Dec. 15, 1977) (remarks of Sen. Muskie).

The Court's decision below is specifically at odds with the federal statutory policy on combined sewer overflows which stops far short of requiring total elimination. As Milwaukee amply demonstrates in its Petition, the thrust of federal activity has been to control, not eliminate combined sewer overflows. Indeed, federal policy in this regard is intentionally cautious. In 1977 Congress commissioned a study by the Environmental Protection Agency of the status of combined sewer overflow problems. Clean Water Act § 516(c), 33 U.S.C. 1375(c) (1977). Recognizing that combined sewer overflows remain a widespread problem in many metropolitan areas, Congress asked the Executive to

assemble additional information on the scope of the problem, the time and money necessary to deal with it, and the technological alternatives available.

Congress mandated that the study was to include two items of particular relevance here:

> "(3) an estimate for each applicable municipality of the number of years necessary, assuming an annual authorization and appropriation for the construction grants program of $5,000,000,000, to correct combined sewer overflow problems", and
>
> "(5) an analysis of the technological alternatives available to municipalities to correct major combined sewer overflow problems." *Id.*

It is hard to imagine a clearer indication than the first of these provisions that Congress views the municipal obligation to "correct" overflow problems as related to the availability of federal financial assistance.

With respect to the mode of correction, the Senate Committee stated:

> "new technologies for addressing this problem have been brought to the Committee's attention. . . . The report should include an identification and discussion of these systems *especially where their deployment would result in cost savings* compared with conventional systems." (emphasis added) S. Rep., *supra,* at 81 (4406).

Again, it is hard to imagine a clearer indication that Congress considers cost effectiveness a key ingredient in the development of an overflow correction strategy.

Legislative intent with respect to combined sewer overflows was perhaps best summarized by Congress-

man Roberts during House debate of the Conference Report.

> "There is a need for a strong and consistent national policy on this matter, providing adequate Federal assistance for the correction of combined sewers. This study should contain *options* for the federal government *to develop* a positive role of leadership and financial assistance." (emphasis added) 123 Cong. Rec. H.12938 (daily ed. Dec. 15, 1977).

The Congress is deliberately assessing this problem on a national basis and moving towards a national program to deal with it. While that policy development is in process, federal courts should not force municipalities to spend enormous sums of money, without the benefit of federal funding, on technological solutions that the federal government may determine at a subsequent date to be inappropriate or excessive. To allow courts to develop a common law requirement for total elimination of overflows, while the legislature weighs the costs and benefits to be derived from less drastic correction measures, fails every test of logic and common sense.

Other statutory mandates provide equally convincing evidence that Congress deems both costs and the availability of federal funds as integral elements of the municipal treatment program. For a court to ignore these factors in fashioning common law remedies is to ignore one of the most important policy thrusts of the federal water pollution control program.

If the 1972 Act was ever ambiguous on this point, the 1977 Act is clear. Section 41 of Public Law 95-217 requires the identification and selection of cost effec-

tive alternatives to meet the regulatory compliance requirements of the Act, including specifically those applicable to municipal treatment plants. Clean Water Act § 217, 33 U.S.C. 1297 (1977). Section 45 of PL 95-217 similarly ties achievement of municipal regulatory objectives to the availability of federal funds by authorizing extensions in the 1977 deadline for secondary treatment where the federal government failed to make financial assistance available in a timely manner. Clean Water Act § 301(i), 33 U.S.C. 1311(i) (1977).

To fashion remedies without regard to cost or funding implications is to ignore the specific direction of Congress that these are guiding factors in municipal pollution abatement policy. Elimination of combined sewer overflow is not the only remedy ordered below which fails to take these considerations into account. The trial court also ordered a significant acceleration of the construction schedule to which Milwaukee was already committed under the statutory scheme. While this aspect of the remedy was based in part on a stipulation entered into by the parties to provide the engineering definition of the trial court's decision including earlier completion of construction activities than required by the permits, all of which activities were defined in the stipulation as technically "feasible", the court did not consider and there was no stipulation as to whether it was reasonable or efficient. There is a limit to how much engineering and construction waste water treatment and control can absorb each year without introducing distortions in the marketplace. As discussed further below, there is also a limit to municipal borrowing capacity. Finally, there is a limit to how much federal funding can be allotted to the individual states and municipalities each year. As the fed-

eral permit and enforcement program now operates, these are all factors considered in establishing schedules for the construction necessary to assure municipal compliance. If federal courts are free to accelerate these timetables without regard to these factors, the inevitable result will be to overheat the engineering and construction industries, leading to higher prices for a given product or service. Similarly, it will redistribute the overall cost burden between municipal taxpayers and federal taxpayers as towns are forced to spend money faster than their eligibility for matching federal funds can accommodate.

5. Equity Requires Consideration of Costs.

General equitable considerations also require a balancing of costs in devising remedies. The Court below has failed to carefully consider all of the public interests involved in this action. This is not a case like *Georgia* v. *Tennessee Copper Company, supra,* where the interests of a public party may be due more weight than those of a private proprietary litigant. In this case, and in others that will undoubtedly follow if common law nuisance remedies remain available, the courts should carefully balance the interests of public defendants against those of public plaintiffs. If courts are free to impose major construction obligations on municipalities without regard to associated costs, the financial consequences to municipalities will be very severe.

It is generally recognized that the federal funds authorized by the 1977 Act ($25.5 billion, spread over five years), plus the financial resources available to states and municipalities will fall far short of munici-

pal construction needs to meet only the 1983 requirements of the federal statute, much less additional expenditures imposed by courts. One commentator has suggested that to meet the 1983 statutory deadlines, state and local governments will have to spend approximately $15 billion per year for five years over and above the federal financial contribution. Hunciker, "The Clean Water Act of 1977—Modifications of the Municipal Program", 2 Harv. Envt'l L. Rev. 135-138 (1977). This money would have to be raised almost exclusively through long-term bonding and would represent roughly a six to seven fold increase in local borrowings for this purpose. There is virtually no likelihood that the municipal bond markets could absorb this burden without both a precipitous decline in municipal borrowings for non-pollution financing and tremendous upward pressure on interest rates. If courts force additional borrowings for cleanup beyond the federal program, it will only aggravate an already difficult situation.

Without assessing the impact of this consideration upon Petitioners in this case, it is obvious that courts will be affecting tax and debt burdens of municipalities, as well as the ability of municipalities to finance competing non-pollution services if they are free to impose tremendous new financial obligations for waste treatment.

As ill suited as the federal courts may be to weigh the implications of their remedies for municipal taxpayers, it would be even more dangerous for them to ignore those implications entirely as the Court below has done.

CONCLUSION

For the reasons set forth above, we submit that this case involves issues of significant national impact. We therefore urge that this Court grant the Petition for Certiorari, receive full briefs on the merits and hear oral argument in this case.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-408

CITY OF MILWAUKEE, ET AL.,

Petitioners,

v.

STATE OF ILLINOIS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF MID-AMERICA LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI AND BRIEF OF MID-AMERICA LEGAL FOUNDATION AS AMICUS CURIAE

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MOTION OF MID-AMERICA LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITON FOR CERTIORARI

Pursuant to this Court's Rule 42, Mid-America Legal Foundation ("*Mid-America*") hereby moves the Court for leave to file the attached brief as *amicus curiae* in support of the

captioned petition for certiorari. *Mid-America* understands that a petition for certiorari also may be filed by the State of Illinois, et al. and, for the reasons set forth in the attached brief, supports the granting of such petition.

Mid-America has an interest in the disposition of the case which is before this Court in the petition(s) for writ of certiorari to review the judgment and opinion of the Court of Appeals for the Seventh Circuit in *Illinois* v. *City of Milwaukee*, ____ F.2d ____, 13 E.R.C. 1049 (7th Cir. 1979) based upon the expertise and purpose of this organization.

Mid-America was organized in 1975 as an Illinois not-for-profit corporation to engage in non-partisan legal research, study and analysis for the benefit of the general public as to the effect of evolving concepts of law on our democratic institutions and to provide legal representation on matters of public interest at all levels of the judicial process. *Mid-America* takes special interest in questions of law of a national scope that originate in or have a direct effect on the mid-America region, namely, Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin. It has an interest in this case because the decision below interprets the Federal Water Pollution Control Act of 1972, PL 92-500, the Clean Water Act of 1977, PL 95-217 which amends the 1972 Act, and the federal common law of nuisance in a way which affects the interests of every state which shares a waterway with one or more states. By analogy, the implications of this decision extend beyond the question of interstate water pollution to include problems of air pollution, land use, safety and energy production.

Mid-America respectfully submits that its brief, lodged herewith, presents at least one analysis of a significant question of federal law and related authority which is not presented by the parties. It, therefore, believes that the question would not otherwise be presented, or at least adequately presented with related authority, although it could be dispositive of whether this Court grants the petition for certiorari.

It is the view of *Mid-America* that the court below has decided an important question of the relationship between federal common law and federal regulatory statutes which has not been, but should be, settled by this Court and that the decision below is in conflict with applicable decisions of this Court under the federal common law of public nuisance.

Mid-America has received the written consent of City of Milwaukee, et al., copy of this letter has been filed with the Clerk. Consent was refused by counsel for the State of Illinois, et al., thereby necessitating this motion.

Mid-America respectfully urges the Court to grant this motion for leave to file the attached brief as *amicus curiae.*

Respectfully submitted,

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BRIEF OF MID-AMERICA LEGAL FOUNDATION AS AMICUS CURIAE

INTEREST OF AMICUS

The interest of Mid-America Legal Foundation *("Mid-America")* as *amicus curiae* is stated briefly in the motion for leave to file this brief. It is appropriate to expand on that statement here.

Mid-America has an interest in this case because the decision below interprets the Federal Water Pollution Control Act of 1972, PL 92-500 ("FWPCA"), the Clean Water Act of 1977, PL 95-217, which amends the 1972 Act, and the federal common law of public nuisance in a way which affects the interests of every state which shares a waterway with one or more other states.

The ramifications of this decision, however, extend beyond the scope of an individual state's interest in water pollution to include potential problems of interstate land use, air pollution, safety and energy production premised on the federal common law of public nuisance, a heretofore limited and amorphous body of law.

The present case, involving allegations of interstate water pollution, is not singular and should not be considered in isolation. The geography of the nation itself would turn the variable standard applied by the district court and the court of appeals into a quagmire of judicial uncertainty. Every state which discharges sewage into a common waterway in compliance with federal legislative standards, nonetheless, may be subject to imposition of more stringent standards under federal common law, even though the complaining state itself does not comply with the asserted common-law standard. By analogy this same discrepancy in standard also would arise in cases involving air pollution, land use, safety and energy production.

The economic impact of the lower court's decision is equally significant. The courts below expanded the role of the judiciary in this area by effectively substituting their judgment for that of Congress, the states and local entities in determining both the priority of expenditures and the methods of abating a type of water pollution.

It is indeed paradoxical that even though during the course of the present litigation Congress detailed with considerable specificity the federal standards for water pollution control and

tightened enforcement procedures under these standards, the court below chose to ignore these developments and instead expand the body of federal common law in a manner that can only result in confusion and proliferation of litigation.

It is on the basis of an appreciation of these circumstances and the direct application of the precedent established with respect to the relationship of federal common law and statutory law in many other areas of current significant legislation that the *amicus* has developed an interest in the matter before the Court.

QUESTION PRESENTED

No matter how the parties may frame the specific questions presented, the underlying question of the proper relationship between federal common law and a related regulatory statute will be fairly comprised therein. Specifically, the question may be framed in the terms and circumstances of the case as follows:

> *Where the occasional discharge of pathogens into local waters complies with the applicable federal and state statutes and regulations, does a neighboring State establish a claim of public nuisance under federal common law merely by showing that pathogens so discharged may sometimes reach its own waters and possibly infect its residents?*

ARGUMENT

1. The Court of Appeals Has Decided an Important Question of the Relationship Between Federal Common Law and Federal Regulatory Statutes Which Has Not Been, But Should Be, Settled By This Court.

As the court of appeals recognized, it is "appropriate to give weight to Congress' expectations in adopting the [Federal Water Pollution Control] Act and the standards established by EPA pursuant to the Act." *Illinois* v. *City of Milwaukee,* 13 ERC 1058. How to weigh congressional intentions and to articulate them with applicable common-law principles is a question this Court should decide. The answer may bear not only on cases of interstate water pollution, but on every controversy in which schemes of federal environmental legislation and regulation cut across fields of common law, such as land use, energy, safety and air pollution.

Noticing that common-law remedies are indeed preserved under FWPCA is only the beginning of the inquiry which this Court should undertake. A determination that the federal statute does not preempt existing law, state or federal, is not tantamount to a warrant for a court to ignore the statutory framework of water-pollution control when defining or remedying common-law nuisances in this field.

Even if the court of appeals had rendered a clearcut decision on the relationship of the federal statute to common law, it would be wise for this Court to review the decision because the ramifications are so sweeping. But the court's decision was essentially a compromise which left the governing rationale open to grave doubt. Review by this Court is thus plainly required so that in the future parties may conform their conduct to intelligible standards.

In reversing the order of the district court on effluent limitations, the court of appeals acknowledged that the statutory framework has common-law implications: the order was overruled because there was no evidence to justify imposing stricter limitations than those established by EPA. 13 ERC at 1068. Thus, without precluding equitable remedies outside its own elaborate procedures, the statute operates to caution the court against fashioning such relief in the absence of a particularized justification.

Yet the court of appeals effectively ignored the same statutory framework of regulation in affirming the district court's order on overflows of raw sewage: these were to be totally eliminated even if they complied with EPA regulations and even though Illinois did not show that the occasional discharge of raw sewage created a substantially greater risk of harm to Illinois residents than did the regular discharge of treated sewage. *Id.* at 1064.

The district court's frank confession of bewilderment in the face of conflicting expert testimony, Pet. Cert. App. F____, points up a larger conceptual problem with which this Court should come to grips: the proper function of the specialized knowledge of experts in deciding questions of common-law nuisance where agency expertise is already serving to inform a regulatory scheme based on federal statute.

This particular problem, which again has implications far beyond the regulatory scheme involved in this case, can be illuminated by considering the rationale supporting the doctrine of primary administrative jurisdiction, which speaks to an analogous concern. Recently, in holding that a proceeding under the Sherman Act should be stayed until an administrative agency considered whether a commodity exchange rule was valid under a regulatory statute, this Court reasoned that "determination [of facts] will be of great help to the antitrust court in arriving at the essential accommodation between the

antitrust and the regulatory regimes." *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, 307 (1973). The Court observed that the trial court would "be in a position to make a more intelligent and sensitive judgment as to whether the antitrust laws will punish what an apparently valid rule of the Exchange permits" if the agency first passed on the precise question within its jurisdiction. *Id.* at 307-308.

In *Ricci,* the precise reach of the Sherman Act's broad language was to be defined by the antitrust court in light of agency articulation of the narrower regulatory regime. In the case at bar, the court's understanding of the merits of the common-law claim would have been materially assisted by EPA development of a factual record on the possible dangers of Milwaukee sewage to Illinois residents. Although Illinois invoked the enforcement procedures of the pre-1972 Act, it did not seek relief within the terms of FWPCA by requesting a veto or modification of the discharge permits. The trial court, therefore, had to adjudicate the claim without prior agency consideration of the specific factual question. Accordingly, in *Ricci* terms, the court was in a poorer position to make an informed judgment as to whether the common law should enjoin what the regulations apparently permit.

In the absence of agency findings on the very point at issue, a court should be reluctant to expand common-law rights or remedies in a field where common-law and regulatory regimes must be accommodated. Indeed, this Court might conclude that where a statutory scheme of water-pollution control is operating, the common-law judge should not disturb uncontested administrative decisions—like the decision to issue a permit to Milwaukee allowing occasional raw-sewage overflows into Lake Michigan—without a particularized showing of necessity. Such a conclusion would in no way abridge common-law rights in contravention of FWPCA section 505 (33 U.S.C. § 1365), but would place the burden of proof squarely on the plaintiff, where it belongs. *See, e.g., North Dakota* v. *Min-*

nesota, 263 U.S. 365 (1923). In particular, this would simply require application to a nuisance question of the court of appeals' reasoning on the effluent-limitation remedy.

The court of appeals also found that the correct standard of proof was a preponderance of evidence. 13 ERC at 1060. The question of the standard of proof in federal common-law nuisance actions where this Court does not have exclusive original jurisdiction has never been addressed directly by this Court, although where the defendant is a state the standard of clear and convincing evidence has been applied, *New York* v. *New Jersey,* 256 U.S. 296, 309 (1921); *Missouri* v. *Illinois,* 200 U.S. 496, 520-522 (1906). In a case where expert testimony is in conflict and where hypotheses are stacked one upon another, the outcome may turn on the standard of proof. This Court should consider whether a plaintiff—state, political subdivision, or individual citizen—should be held to the same high standard of proof where the defendant is a political subdivision of another state. The court of appeals did not explain why the working of the federal system should require a different standard in the two cases.

While the standard of proof in interstate actions should comport with constitutional principles of federalism, the substantive issue in this case may hinge on the constitutional division of labor between the courts and Congress. In general, the legislatures, not the courts, have the power to find that any risk of harm, however small, is unacceptable. Legislative definition of a nuisance need only be rational. *See, e.g., United States* v. *Ashland Oil and Transportation Co.,* 504 F.2d 1317, 1323 (6th Cir. 1974); *cf. Reserve Mining Co.* v. *EPA,* 514 F.2d 492 (8th Cir. 1975); *Hadacheck* v. *City of Los Angeles,* 237 U.S. 394 (1915). But where a statutory framework of regulation tolerates certain risks of harm, the expansion of common-law

remedies to protect against the same risks interferes with the efficient operation of the regulatory scheme, upsets reasonable expectations, and requires vast expenditures without any clear hope of significant improvements in public health or safety. This Court may address this important federal question by reviewing the present case.

2. The Decision Below Is in Conflict With Applicable Decisions of this Court Under the Federal Common Law of Public Nuisance.

Quite apart from the existence of a regulatory regime, the decision of the court of appeals poses important questions of the burden and standard of proof in federal common-law nuisance claims. In an action between states, the question of proof must be approached with "great and serious caution." *Missouri* v. *Illinois*, 200 U.S. at 520. The district court and court of appeals were considerably less than cautious both in assessing the legal sufficiency of the evidence and in fixing the standard of proof.

The court below rejected the standard of clear and convincing evidence, which invariably had been applied in interstate cases, and attempted to distinguish *New York* v. *New Jersey* and *Missouri* v. *Illinois* on the grounds that these were original actions in this Court, which coped with its unaccustomed role as factfinder by setting a high standard of proof. 13 ERC at 1060. This rationale, set forth as dictum in a later case where the defendant was a private party, *Ohio* v. *Wyandotte Chemical Corp.*, 401 U.S. 493, 501 (1971), played no role, however, in the interstate cases themselves, where the standard was chosen because of the quasi-sovereign status of the parties. Although the sovereignty rationale is not literally applicable to the case at bar, *cf. Illinois* v. *City of Milwaukee*, 406 U.S. 91, 98 (1972), the substantive issue in fact involves the desire of two states, Illinois and Michigan, to control the conduct of another, Wisconsin, which issued the discharge permits to Milwaukee, in a way in which they are unwilling to control themselves or their

own political subdivisions. The views of a fourth state with a direct interest, Indiana, have not been presented. The rule this Court imposed on itself in *New York* v. *New Jersey* should apply at least as strictly to lower courts which adjudicate interstate claims. Before a court exercises the extraordinary power to control one state's conduct at the instance of another, the threatened invasion of rights must be "established by clear and convincing evidence." 256 U.S. at 309. This is especially true where, as here under FWPCA, Illinois, Michigan or any affected state could seek mandatory imposition of the asserted raw-sewage overflow standard with full benefits of regulatory agency expertise simply by adopting that standard for overflow discharges within its own borders. 33 U.S.C. § 1342.

The primary issue in this case, however, is whether liability for public nuisance was properly established at all. In holding that the evidence was sufficient to support a finding that "defendants' actions pose a significant risk of injury to Illinois residents," 13 ERC at 1060—a finding essential to proving a common-law public nuisance—the court pointed to the following facts: pathogens in Milwaukee sewage probably reach Illinois waters several times a year; these pathogens may infect drinking-water supplies if treatment plants malfunction, and possibly otherwise; the pathogens may infect swimmers who come directly into contact with them. (The court did not discuss the sufficiency of the evidence supporting the finding that Milwaukee's conduct "constituted a substantial contribution to the accelerated eutrophication" of the Illinois waters of Lake Michigan. *Id.* at 1062.) This brief parade of possibles constituted, in the court's view, sufficient evidence of risk of harm. It was apparently for Milwaukee to show that its conduct did *not* significantly endanger Illinois residents. This Court may ask whether this novel allocation of the burden of proof is proper under the common law, with or without FWPCA.

In *New York* v. *New Jersey,* this Court required that the nuisance be "of serious magnitude." 256 U.S. at 309. That suit

was dismissed because New York failed to prove that the proposed discharges into New York Harbor would cause an increased danger of disease to New York residents. *Id.* at 309-310. In an earlier case, Missouri's claim against Illinois had been dismissed when no connection was shown between the fact that typhoid bacilli from Chicago sewage discharges probably survived the journey to the St. Louis water intake and the increase in typhoid fever deaths in St. Louis. *Missouri* v. *Illinois,* 200 U.S. at 522-526. By applying the reasoning of the court of appeals to the *Missouri* case, a court could have found sufficient evidence of nuisance merely by noting that pathogens from Chicago likely arrived in Missouri and might infect its residents. But this Court, exercising caution, did not find a significant risk of injury in such a string of commonplaces.

The holding of *New York* v. *New Jersey* was followed expressly in *North Dakota* v. *Minnesota,* 263 U.S. at 374. Finding that the plaintiff failed to sustain its burden of proof, this Court went on to observe:

> "It is difficult for a court to decide issues of fact upon which experts equal in number and standing differ flatly and when their conclusions rest on estimates upon the correctness of which the court, without technical knowledge, cannot undertake to pass. In such cases, the court looks about for outstanding facts from which the lay mind can safely draw inferences as to the probabilities." *Id.* at 385-386.

The court of appeals in the present case, rather than draw inferences as to the probabilities, either safely or rashly, apparently found it unnecessary seriously to consider probabilities at all. The parade of plausibles or possibles, expressly based on "less evidence than [Illinois] should have [produced]", Pet. Cert. App., F.____, satisfied the court's peculiar test of minimal probability and effectively shifted the burden of proof to the defendant. The approach taken by this Court has

been consistently different, yet the court of appeals gave no reason for its radical departure from established principles of the federal common law of nuisance.

By contrast, in the court of appeals' reversal of the district court on the effluent limitation, we see not only a sound common-law argument, taking proper account of the relevant statutory framework, but a model of reasoning which the court of appeals ought to have applied to the overflow prohibition and to the primary question, that of liability itself.

After establishing liability on the basis of what is merely possible, the court reversed the district court's order in so far as it imposed an effluent limitation several times stricter than EPA's. The court reasoned that evidence must be given to support the conclusion "that the relief granted is necessary to protect the complaining party from harm." 13 ERC at 1067. Although "general testimony" was offered that a stricter standard, measured in milligrams per liter, correlated with more effective chlorination, the evidence did not "show how much more effective chlorination would be a[t] 5 mg/1 . . . than at 30 mg/1". *Id.* "[T]he difference may be significant or it may be *de minimis.*" *Id.* The question, in assessing the justification of the relief granted, was "whether significant benefits will result" from the higher standard. *Id.* The court noted that the evidence "consists merely of conclusions of [certain] experts and does not explain why the particular standards are necessary to protect the health of Illinois residents." *Id.* The district court's conclusion rested on "a speculative and uncertain basis." 13 ERC at 1068. Finally, the court of appeals looked to the EPA effluent limitations, holding in effect that a particularized justification was required for imposing stricter standards. Finding no justification in the record, the court did not sustain the order. *Id.*

The court of appeals' attempt to distinguish the overflow order from the effluent-limitation order is unpersuasive. The court baldly asserted that the probabilities of harm from raw

sewage are significantly greater, though it is plain that the sort of particularized support the court required with respect to the effluent limitation was totally absent. 13 ERC at 1069.

The court also remarked that FWPCA itself "arguabl[y]" prohibits discharges of raw sewage. *Id.* Since Illinois sued only on a common-law theory, the intended force of this point must be to bolster the court's novel burden-shifting procedure by suggesting that it is consistent with congressional policy. We need not address the merits of the court's quite unprecedented construction of the statute, however, to argue that, while Congress or any legislature may prohibit conduct having a risk of harm without any showing of actual harm, an injunction will not issue from a court of law in nuisance cases simply as a matter of course. *Harrisonville* v. *W. S. Dickey Clay Manufacturing Co.*, 289 U.S. 334 (1933). Generally, "if the evidence be conflicting and the injury doubtful, this extraordinary remedy will be withheld." *Parker* v. *Winnipiseogee Lake Cotton and Woollen Co.*, 67 U.S. (2 Black) 545, 553 (1863) (dictum).

Nor is it clear that congressional intent would be honored by expansion of common-law remedies. The difference between legislative and judicial proscription may not be merely a difference in degree. It is easily conceivable that the two regimes may clash, and, in the meantime, all parties must pay the price of uncertainty in trying to conform to the requirements of the law. The specter of costly and potentially stultifying confusion thus raised by the decision of the court of appeals is a reason for this Court to review this case.

CONCLUSION

For the aforegoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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* We wish to acknowledge the assistance of Philip Fertik, a law student at The University of Chicago Law School, and Carol Lifland, a law student at Northwestern University School of Law.

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Nos. 79-408 and 79-571

In the Supreme Court of the United States

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CITY OF MILWAUKEE, ET AL., PETITIONERS

v.

STATE OF ILLINOIS, ET AL.

STATE OF ILLINOIS, PETITIONER

v.

CITY OF MILWAUKEE, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1979

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CITY OF MILWAUKEE, ET AL., PETITIONERS

v.

STATE OF ILLINOIS, ET AL.

No. 79-571

STATE OF ILLINOIS, PETITIONER

v.

CITY OF MILWAUKEE, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's invitation of November 26, 1979.

1. The present suit followed upon this Court's denial of leave to Illinois to file an original action to the same end. *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972). Although noting that "new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance," 406 U.S. at 107, the Court

held that the federal common law had not been pre-empted by the Federal Water Pollution Control Act then in effect, 33 U.S.C. (1970 ed.) 1151 *et seq.* Invoking that ruling, Illinois sought from the district court an injunction to restrain the City of Milwaukee and the Sewerage Commissions of the City and County of Milwaukee (collectively, the "City") from discharging raw sewage and inadequately treated sewage into Lake Michigan. Illinois alleged that the City's discharges into Lake Michigan constituted a public nuisance (1) as a hazard to public health, and (2) as a major factor accelerating eutrophication of the lake. The State of Michigan intervened as a plaintiff on the issue of eutrophication only.

Not long after the filing of this suit, Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816,[1] and the defendants argued that this substantial revision and expansion of the statutory scheme earlier considered by this Court in *Illinois* v. *Milwaukee* pre-empted plaintiffs' common law action (Pet. App. G-1). The district court denied the motion to dismiss and, after a four-month trial, the court held for plaintiffs (Pet. App. F-1), and entered judgment ordering abatement relief (Pet. App. D-1).

2. On appeal, the City urged, *inter alia*, that the district court had erred in failing to treat the Clean Water Act as determinative of both the City's liability and the nature and extent of appropriate relief (Pet. App. A-2 to A-3). The United States submitted a brief amicus curiae in the court of appeals directed solely to the issue whether the Clean Water Act wholly pre-

[1]Hereafter, the Federal Water Pollution Control Act, as amended, will generally be referred to by its popular name, the "Clean Water Act." See the Clean Water Act of 1977, Pub. L. No. 95-217, Section 2, 91 Stat. 1566.

empted common law actions. We argued that the federal courts remain free to fashion relief appropriate to abate nuisances created by interstate water pollution, but took no position on whether Illinois had established a meritorious common law claim.

The court of appeals affirmed in part and reversed in part. The court agreed with the United States that (1) the Clean Water Act did not pre-empt the federal common law of nuisance (Pet. App. A-17 to A-18); (2) compliance with a discharge permit issued under the Act is not a defense to such a nuisance action (Pet. App. A-19); and (3) abatement relief in such an action is not limited by the Act to imposition of standards no more stringent than those required as a regulatory minimum (Pet. App. A-20 to A-23). The decision went on, however, to hold that the policies, and even the standards, of the Clean Water Act should guide a court in deciding water pollution cases brought on a nuisance theory (Pet. App. A-20 to A-23). Applying this principle, the court found the evidence sufficient to support the conclusion that the City's raw sewage discharges both constitute a hazard to public health and substantially contribute to eutrophication, and thus are subject to abatement (Pet. App. A-26 to A-30). But the court reversed insofar as the district court had imposed an effluent standard for the treatment plants more stringent than that required under the Clean Water Act (Pet. App. A-47 to A-48).

3. The City's petition presents, *inter alia*, the issue of pre-emption left open by the Court in *Illinois* v. *Milwaukee*, *supra*. While that question is not inappropriate for consideration here, we believe it was correctly decided by the court of appeals and, in the absence of any conflict, we cannot conclude that further review is warranted.

The court of appeals, we submit, has persuasively demonstrated that the Clean Water Act, both before and after the 1972 Amendments (Pet. App. A-8 TO A-17),[2] does not pre-empt the common law remedy, notwithstanding the apparently comprehensive sweep of the statute. We highlight only two points.

a. First, as the court of appeals noted (Pet. App. A-18), the provision authorizing "citizen suits" expressly provides in pertinent part:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

Section 505(e), 33 U.S.C. 1365(e). And the legislative history of this provision leaves no doubt that Congress intended not only to preserve all common law remedies, but to prevent statutory compliance from becoming an affirmative defense to a common law action.[3]

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[2]In addition to the 1972 Amendments, the Clean Water Act was further amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, which did not change the basic structure of that Act established by the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816. The only change which may be relevant here was an extension of the deadline by which municipalities are to achieve compliance with pollution control requirements from July 1, 1977, to no later than July 1, 1983, where compliance has been delayed by construction problems or lack of federal financial assistance. Clean Water Act of 1977, Pub. L. No. 95-217, Section 45, 91 Stat. 1584-1586.

[3]The Senate Report states:

> It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. *Compliance with requirements under this Act would*

b. Second, the technology-based effluent limitations promulgated by the Environmental Protection Agency pursuant to the Clean Water Act establish only the *least* that must be required of a polluter, *i.e.*, a uniform baseline of controls. The states are expressly authorized by Section 510 of the Act, 33 U.S.C. 1350, to adopt and enforce still more stringent controls.[4] The states also are given primary responsibility for adoption of water quality standards under Section 303 of the Act, 33 U.S.C. 1313. More stringent effluent limitations may be necessary to protect the water quality needs of a particular body of water, or, as alleged here, to protect a complaining party from harm which results despite the fact that the discharges are being made under a permit granted pursuant to the Act. This, as the court of appeals held (Pet. App. A-17 to A-18), leaves open a

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not be a defense to a common law action for pollution damages.

S. Rep. No. 92-414, 92d Cong., 1st Sess. 81 (1971) (emphasis added). Similarly, the House Report states:

> Subsection (e) provides that the right of persons (or class of persons) to seek * * * relief under any statute or common law is not affected.

H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 134 (1972).

[4]Section 510, 33 U.S.C. 1370, provides:

> Except as expressly provided in this [Act], nothing in this [Act] shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that * * * such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, of standard or performance which is less stringent than * * * [one in effect] under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

continuing role to be played by the federal common law of nuisance, not inconsistently with the Clean Water Act.[5]

For these reasons, among others, we adhere to the submission we made in the court of appeals, that the Clean Water Act did not pre-empt or displace rights and remedies under the federal common law of nuisance.

4. The remaining issues concern the application to the factual situation in suit of the rule that, on proof of nuisance under federal common law, the policies and standards of the Clean Water Act provide "an appropriate starting point" on the issues of relief, but not an automatic limitation (Pet. App. A-20 to A-21).[6] The City's petition for certiorari complains that the court of

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[5]Other federal courts which have faced this question have uniformly concluded that federal common law survives the enactment of the 1972 Amendments, at least as to interstate pollution. *California Tahoe Regional Planning Agency* v. *Jennings*, 594 F. 2d 181, 193 (9th Cir. 1979), cert. denied, No. 79-15 (Oct. 1, 1979); *United States ex rel. Scott* v. *United States Steel Corp.*, 356 F. Supp. 556, 559 (N.D. Ill. 1973); *United States* v. *Ira S. Bushey and Sons, Inc.*, 346 F. Supp. 145, 149-150 (D. Vt. 1972), aff'd mem., 487 F. 2d 1393 (2d Cir. 1974), cert. denied, 417 U.S. 976 (1974). See *United States* v. *Stoeco Homes Inc.*, 498 F. 2d 597, 611 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975); *Township of Long Beach* v. *City of New York*, 445 F. Supp. 1203, 1214-1215 (D. N.J. 1978).

Petitioners point to no conflicting decisions on this question. And the volume of reported common law litigation subsequent to the Court's 1972 decision in *Illinois* v. *Milwaukee* certainly has yet to bear out any "floodgates" argument (79-408 Pet. 22, 31).

[6]"Congress' position in the Act does not, as we have held, mark the limits of our power in this common law nuisance action, but the policy underlying that position, to which we should give some deference, is at least a reason not to allow the nature of the action to cause a relaxation of the requirements of evidentiary foundation that would normally be observed in other kinds of actions." Pet. App. A-46 (footnote omitted).

appeals went too far beyond the requirements of the Act: the cross-petition takes the contrary view.

These are matters as to which the United States expressed no opinion in the court of appeals and it seems inappropriate to do so here. But, whatever the correct result in this case, it does not appear that review by this Court of the nature and scope of relief ordered is warranted. First, once the proposition that the Clean Water Act establishes a floor and not a ceiling is accepted, the propriety of the relief awarded is a question that turns primarily on the particular factual setting. And, second, because there has been no flood of lawsuits brought under the federal common law of nuisance, there is little reason to suppose that the questions of relief arising here will be a recurring problem meriting this Court's attention.

5. Accordingly, we suggest that both petitions for certiorari may appropriately be denied.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-408

City of Milwaukee, The Sewerage Commission Of The City of Milwaukee, And The Metropolitan Sewerage Commission Of The County Of Milwaukee,
Petitioners,

vs.

People Of The State Of Illinois And People Of The State Of Michigan,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF AMICUS CURIAE OF THE STATE OF WISCONSIN IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI OF THE CITY OF MILWAUKEE, ET AL.

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STATEMENT OF THE CASE

We respectfully refer the Court to the Citation Of Opinions Below, the Statement of Jurisdiction, the Citation of Statutory Provisions Involved, and the Statement of the Case presented in the Petition for Writ of the City of Milwaukee, et al. filed with the Court in this proceeding.

The State of Wisconsin by its Attorney General respectfully submits this brief amicus curiae, in support of the Petition for a Writ of Certiorari of the City of Milwaukee, et al., pursuant to Rule 42 (4) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Has the federal common law of nuisance survived the enactment of the Federal Water Pollution Control Act of 1972 (hereinafter FWPCA)?

2. If it has, what degree of deference should a federal court exercising that jurisdiction pay to the national regulatory scheme established by the FWPCA and to state action under that Act to enforce its requirements?

INTEREST OF AMICUS CURIAE

The United States Congress enacted the Federal Water Pollution Control Act Amendments of 1972, PL 92-500, 33 U.S.C. §§ 1251-1376, to provide a comprehensive, uniform, and national solution to the problem of pollution of the waters of the United States. Pursuant to sec. 402(b), 33 U.S.C. § 1342(b) of the Act, the enforcement obligations of the National Pollutant Discharge Elimination System in the State of Wisconsin were delegated to the Wisconsin Department of Natural Resources and the Attorney General of the

State of Wisconsin. In order to fulfill those obligations, Chapter 147 of the Wisconsin Statutes was enacted in 1974, creating the Wisconsin Pollutant Discharge Elimination System (WPDES), consistent in all necessary regards with the requirements of the federal act.

Pursuant to the requirements of these state and federal laws, the Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee applied for and obtained WPDES permits from the State of Wisconsin for the operation of their sewage collection and treatment facilities. When the Commissions violated the requirements of those permits, the State of Wisconsin brought suit to enforce the requirements of the law and to secure abatement of water pollution in the area served by the Commissions.

On May 25, 1977, the State of Wisconsin concluded its enforcement action in State Circuit Court against the two Commissions with a judgment which complies with federal and state water pollution laws and standards, which comprehensively addresses the attainment of effluent limitations and abatement of combined sewer overflows (CSO), and which adequately protects the interests of residents of Illinois, Michigan and Wisconsin in limiting discharges of pollutants to Lake Michigan.

On November 15, 1977, the United States District Court for the Northern District of Illinois entered a judgment requiring the Commissions to treat all sewage to meet certain effluent limitations six times more stringent than those required under the FWPCA and to construct a system to eliminate all overflows of raw sewage from combined sanitary and storm sewers. On April 26, 1979, the Court of Appeals for the Seventh Circuit reversed the order of the District Court

insofar as it imposed effluent limitations stricter than those required under the FWPCA. It affirmed that part of the order requiring the elimination of all sewage overflows.

While the exercise of jurisdiction by a United States District Court may appear compatible with that of Wisconsin, this is not necessarily the case. While attempting to reach similar goals, the remedies of the two courts may conflict in such a fashion as to frustrate the efforts of the State of Wisconsin and to usurp its enforcement authority.

This fact has far-reaching implications for the State of Wisconsin and all other states with delegated authority under the FWPCA or the Clean Water Act of 1977 (hereinafter CWA), PL 95-217, 33 U.S.C. §§ 1251-1376. If other jurisdictions may rely on the federal common law of nuisance as Illinois did here, while choosing to ignore the opportunities provided for enforcement through the NPDES process, conflicting results, multiplicity of suits, and frustration of the national goal of clean water will be the result. Such disruption of the NPDES State enforcement process undermines its integrity and should not be lightly approved.

Accordingly, the State of Wisconsin urges this Court to grant the Writ of Certiorari and determine what, if any, vitality the federal common law of nuisance maintains in light of the FWPCA and the CWA. If the federal common law of nuisance does survive, then this Court has the opportunity to declare for the benefit of local, state and federal government that, while a federal court might properly exercise federal common law jurisdiction in this area, when the responsible state authorities are clearly fulfilling their enforcement obligations under the national regulartory scheme the federal court must defer to the state's expertise in establishing the remedy.

This Court should be very wary of suggestions that the remedy imposed by the state pursuant to Congressional mandate is not adequate. After all, the citizens of Milwaukee, Kewaunee, Manitowoc, Sheboygan, Racine and Kenosha, Wisconsin have as much interest in clean Lake Michigan water for drinking and recreation as do the citizens of Illinois. Indeed, being closer to the source of the alleged pollution they and their state government have more reason to be concerned than does Illinois.

ARGUMENT

I. The 1977 Wisconsin Judgment Is A Major Commitment By The Petitioner Sewerage Commissions To Abatement Of Water Pollution And Will Adequately Protect The Citizens Of Illinois, Michigan And Wisconsin

Legal action by the State to enforce federal and state water pollution requirements culminated on May 25, 1977, in the entry of a detailed stipulation between the State and the Commissions which is incorporated in the Wisconsin Judgment. [*The Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee v. State of Wisconsin Department of Natural Resources, Case No. 152-342, Cir. Ct., Dane County.*] The commitment made by the Commissions extends over several decades and represents a major undertaking in terms of federal, state and local dollars expended and level of treatment achieved.

The Wisconsin Judgment is divided into sections, each of which addresses a different aspect of the water pollution problem in Milwaukee. In brief summary, the Wisconsin Judgment requires the Commissions to comply with applicable effluent limitations, to eliminate any dry weather bypassing within the service area, to eliminate all wet weather bypassing, to correct all combined sewer overflows and to restrict all sources of additional waste flow into the system, all by prescribed deadlines. Each deadline established is specifically related to each other, so that constant, maximum effort based upon established priorities is assured.

The Wisconsin Judgment is a comprehensive and balanced approach to the sources of water pollution within the control of the two Commissions. It requires the Commissions to undertake long term, complex abatement efforts and to complete projects and components of those projects in compliance with a detailed and carefully developed schedule of deadlines. The Wisconsin Judgment exemplifies the complex and large scale nature of water pollution abatement in a major metropolitan area. But more importantly in the current context, it exemplifies the State of Wisconsin's determination to fulfill its obligations to the citizens of Wisconsin as well as other states to secure and maintain clean water within its jurisdiction, and to fully and adequately enforce the requirements of the Federal Water Pollution Control Act and the NPDES/WPDES program.

II. Congress Intended To Create A Comprehensive Scheme Of Regulation, And A Remedy Developed Pursuant To This Scheme Must Preempt Other Or Different Approaches

In the case of *Illinois v. Milwaukee,* 406 U.S. 91 (1972), while sending the State of Illinois back to the appropriate district court to pursue its action, the Court commented that "new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance." 406 U.S. at 107. Shortly thereafter, Congress enacted the Federal Water Pollution Control Act Amendments of 1972. We submit that preemption has in fact occurred.

The major purpose of the Act was to create a comprehensive, uniform scheme to achieve the elimination of water pollution on a nationwide basis. At the same time, the Act was designed to eliminate *ad hoc* approaches to solving the problems of water pollution. As expressed in the Report of the Senate Committee on Public Works:

> Water pollution control in the past has all too often been sporadic, inconsistent, and improvised on an ad hoc basis. The major purpose of this legislation is to establish a comprehensive long-range policy for the elimination of water pollution, making it clear to industry and municipalities alike the pollution control performance which will be expected over the next decade. At the same time, the bill provides a mechanism for generating sound, detailed information on the costs which will be associated with the later stages of the control program, and allow subsequent Con-

> gresses to evaluate the success of the policy enunciated in this bill.

U.S. Code Congressional and Administrative News, Vol. 2, 1972, p. 3758.

The Wisconsin Department of Natural Resources applied its considerable expertise to solving the water pollution situation in Milwaukee and it developed a master plan for doing so.

The remedy created by the federal court, in contrast, represents just the kind of *ad hoc* approach to problem-solving Congress was trying to avoid. Congress expressly recognized that sound technology was fundamental to development of reasonable solutions to problems of water pollution. The Senate Committee stated, in reference to the "citizen suit" provision of the Act:

> Section 505 would not substitute a 'common law' or court-developed definition of water quality. An alleged violation of an effluent control limitation or standard, would not require reanalysis of technological in [sic] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision. Therefore, an objective evidentiary standard will have to be met by any citizen who brings an action under this section.

Id. at 3745.

> Enforcement of pollution regulations [once established by the EPA under the statutory scheme] is not a technical matter beyond the competence of the courts. The citizen suit

> provision is consistent with principles underlying the Federal Water Pollution Control Act, that is the development of clear and identifiable requirements. Such requirements should provide manageable and precise benchmarks for enforcement. *Id.* at 3747.

Id. at 3747.

Congress expected the EPA, and in turn, the state agencies, to develop the technical base for a sound pollution abatement program. Congress also specifically demonstrated its intent to relieve the district courts of the difficult technological inquiries and determinations of the specific kind of which Judge Grady complained by saying:

> Ordinarily, when the trier of fact weighs evidence and attempts to come to factual conclusions, he does so in the light of his own experience and his own observations and his own common sense. Not only is this proper to do, it is something that we specifically instruct juries to do in every jury case.
>
> The nature of the subject matter here, however, is such that my own experience and observations in life are of relatively little use to me. It is well known to all of us that the arcane subject matter of some of the expert testimony in this case was sometimes over the heads of all of us to one height or another. I would be certainly less than candid if I did not acknowledge that my grasp of some of the testimony was less complete than I would like it to be, but short of enrolling in a university course directed toward a reorientation of my entire education and spending the years that that would involve, I know of no remedy for the problem. (Pet. App. F-3 and 4)

Where Congress has decisively acted to create a comprehensive regulatory scheme and an effective enforcement mechanism to support it, the courts are left no room in which to entertain and apply equitable remedies based on the common law. For example, in the leading case of *Arizona v. California,* 373 U.S. 546 (1963), the comprehensive scheme created by Congress for allocation among the states of the waters of the Colorado River was held to preclude the courts from applying common law notions of equitable apportionment to determine the water rights of each state involved.

Here, not only has Congress provided a comprehensive statutory alternative inconsistent with continuing invocation of the common law, but the specific problem presented to the federal court for decision was addressed and resolved in the state court. The case for Congressional preemption must be even stronger where, as here, Congressional policy has already been applied at the time the federal judiciary is called upon to act.

The remedy imposed by the State represents application of the highest scientific expertise, conforms to the long-range goals set by Congress, and is consistent with uniform, orderly enforcement of our nation's water pollution control program. The judgment of the federal court leads to regulatory chaos. Progress toward consistent, uniform improvement in water quality demands that solutions to problems of water pollution flowing directly from the Congressional mandate preempt those that do not.

III. Assuming That A Federal Common Law Nuisance Action Survives, The District Court Should Have Deferred To The Judgment Of The Wisconsin State Court Entered Pursuant To State And Federal NPDES Requirements And Refrained From Imposing A Different Remedy

The Seventh Circuit specifically considered and rejected the argument that the enactment of the FWPCA had preempted the federal common law of nuisance in the area of water pollution. Should this Court sustain that determination, a question of equal if not greater importance remains: how are the two authorities to operate effectively in the same arena?

The brief of Amicus Curiae Association of Metropolitan Sewerage Agencies, et al., emphasizes the confusion and unnecessary expense which will be suffered by municipalities across the nation if guidelines on the use of federal common law are not developed by this Court. Similarly, those states such as Wisconsin which are charged with fulfilling their obligations under the national NPDES scheme will find their efforts frustrated, subject to collateral attack, and possibly countermanded by federal courts which choose to fashion remedies completely independent of those imposed by the state./[1]

/[1]It is the State's position that compliance with state law is required regardless of whether federal financial assistance can be made available. However, the State agrees that in a situation such as that faced by Milwaukee, where the pollution abatement program necessary to comply with the law will extend over

The abatement program developed by the State of Wisconsin pursuant to the comprehensive NPDES regulatory scheme must preempt the *ad hoc* problem solving engaged in by the federal court. Basic principles of abstention and comity demand that independent judicial approaches to problem-solving in this area give way to programs developed under Congressional authorization.

A. Comity and Abstention.

Had the State of Wisconsin initiated its action against the Milwaukee Commissions prior to the filing of the federal action, we would emphatically assert that the doctrine of abstention required the federal court to refuse to exercise its jurisdiction.

Abstention is proper for reasons of judicial economy so that one lawsuit will suffice to dispose of the problem, rather than permitting two with the possiblity of conflicting results as well as multiple costs. *White v. Husky Oil Co.*, 266 F. Supp. 239 (D. Mont. 1967). Equitable restraint should be exercised by a federal court where granting of relief would adversely affect the results of a state court action. *Sartin v. Commissioner of Public Safety of St. Of Minn.*, 535 F. 2d 430 (8th Cir. 1976). Further, it is the duty of a federal court to avoid unseemly conflict with a state

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several decades and cost hundreds of millions of dollars, cost to the taxpayers can and should be recognized in the *timetable* established for compliance. The Wisconsin Judgment specifically treats the issues of compliance with the requirements and means of financing separately and in this fashion by establishing priorities and interrelated deadlines for the projects. The federal court's disregard for cost and priorities imposed by Wisconsin threatens the State's carefully laid plans for abatement.

court. *Landis v. Northern American Co.*, 299 U.S. 248 (1936). Implicit in these pronouncements is the notion that an action involving substantially the same question is pending in another forum which can provide an adequate remedy. *Butler v. Judge of U.S. District Court,* 116 F. 2d 1013 (9th Cir. 1941). Neither the parties in the state court nor the issues need be identical. *Landis, supra.*

However, it is clear that the doctrine of abstention is not normally invoked when, as here, the federal action was initiated first. Nonetheless, the guiding principles of that doctrine and the doctrine of comity strongly support the State's position that substantial deference to the state court and the NPDES requirements was required when the federal court reached the point of establishing the proper remedy. The state court had already imposed a remedy consistent with the requirements of the federal and state NPDES programs to solve the identical problem the federal court action sought to resolve. Federal court invocation of the comity principle at the point of establishing the remedy would have had substantial value here in securing uniformity of decision and remedy. *Lauer v. Freudenthal,* 96 Wash. 394, 165 P. 98 (1917).

Our constitutional system recognizes the principle of deference by one branch of government to another within each branch's sphere of influence. Congress, a coordinate political department, has constitutional authority to regulate and protect interstate waterways. The specialized nature of the subject requires deference. The correction of overflows from combined sanitary and storm sewers, for example, involves technical determinations to which the courts bring little expertise. The district court admitted it found the data presented incomprehensible. Congress gave the EPA the primary task of administering the program,

and gave it authority, in turn, to delegate this responsibility to the various states. The expertise employed by the State of Wisconsin Department of Natural Resources in designing a remedy for the water pollution problem here was employed pursuant to the delegation of authority from the EPA and ultimately the Congress. The remedy imposed on Milwaukee derived, then, from the Congressional mandate. The state court judgment was entered pursuant to the comprehensive federal scheme embodied in federal statutes.

The trial court should have deferred to the legislative judgment and accepted as its guide the decisions of the Congress regarding what is necessary to protect interstate waters. At the very least it was incumbent upon the federal court to inform itself of the requirements of the Wisconsin Judgment and to reach a determination as to that remedy's ability to meet the needs of the plaintiffs, Illinois and Michigan. Absent such an evidentiary determination regarding the state's remedy, the federal court was unable to determine the need for it to act. Had such an inquiry been made and had the court been satisfied, as we submit it would, that the state remedy was sufficient, it should then have deferred to that expertise in establishing the remedy. Failing to do so, a federal court risks interruption and frustration of the national pollution abatement process which Congress intended to establish.

This principle of deference is akin to the separation of powers doctrine and is best explained in terms of its similarity to the political question doctrine under which courts decline to decide issues more properly resolved by another branch of government.

> ... Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards of resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

Furthermore, the NPDES/WPDES program provides an adequate administrative forum for consideration of water pollution and public health related issues.

NPDES permits issued by the Wisconsin Department of Natural Resources must meet federal water quality standards and comply with applicable federal laws and regulations, secs. 147.02 (3) (d) (1) and (2), Wis. Stats. Sections 147.09, 147.11, 147.13, and 147.20, Wis. Stats., establish the requirements of notice and opportunity for hearing in the Department of Natural Resources' administration of the NPDES Program in Wisconsin. Under these sections, any affected state may secure a hearing on a permit application, proposed permit or permit modification, or issued permit.

The State of Illinois receives notice of all such permit actions affecting Lake Michigan. It received notice of the original permits proposed for the Milwaukee treatment plants in 1974, and notice again when those permits were issued in late 1974 and early 1975. Similarly, the State of Illinois received notice of the Department's intention to reissue permits to South Shore and Jones Island in 1978, and notice of the actual reissuance of those permits in 1978.

The State of Illinois never availed itself of these opportunities to "make its case" against Milwaukee in the administrative forum. At no time did the State of Illinois submit comments to the Department of Natural Resources on the Milwaukee permits, participate in permit hearings, or seek a hearing on its own motion. The State of Illinois has totally refused to utilize that administrative forum, with its technical expertise, which remains available to it for purposes of making its case. It chose instead to present its case in the judicial forum, where the expertise does not exist, and in so doing ignored the forum for resolution of these issues which Congress clearly intended.

B. Lack of Emergency.

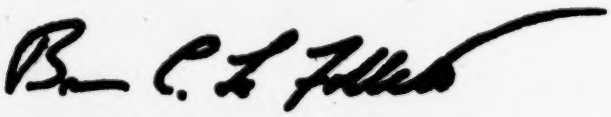
Under well-settled principles of equity jurisprudence, injunctive relief should be granted only when the right to relief is clear. *Missouri v. Illinois,* 180 U.S. 208, 248 (1901). Plainly, there was no compelling need for the court to impose the remedy it did. There was no sudden, dramatic increase in the rate or amount of effluents discharged into the lake, no sudden decrease in water quality near Chicago attributable to Milwaukee, and no evidence of a water-borne outbreak of disease among Chicago residents. Furthermore, the remedy, involving tremendous additional costs to Milwaukee area residents, was imposed without evidence that commensurate additional benefits would accrue to Illinois.

Similarly, we suggest that under established principles of abstention, comity and judicial deference to legislative judgment a court is obliged to act, if at all, with great restraint. We respectfully suggest that if this Court finds that the federal common law of nuisance survives the federal Act, the Court must fashion and require strict adherence to a rule limiting exercise of jurisdiction in these cases to genuine emergency cases, imposing liability only on a clear and convincing showing of a clear and present (not potential) danger, and fashioning a remedy only where the link between the remedy and the harm to be alleviated is beyond dispute and the responsible state government has clearly failed to act. No such showing was made in this case. These circumstances dictate that the District Court should have permitted Milwaukee to proceed to implement the remedy imposed by the state court according to the schedule approved by that court.

CONCLUSION

The circumstances of this case present this Court with the opportunity to determine if the federal common law of nuisance has survived the adoption of the Federal Water Pollution Control Act, and if it has, what degree of deference a federal court must pay to the national regulatory scheme established by Congress and to state actions taken in furtherance of those national goals. A decision on these questions is of paramount importance to the federal government, to each of the states, and to their political subdivisions. We urge the Court to grant the Writ and to review the case on the merits.

Respectfully submitted,



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Supreme Court of the United States

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No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals dated April 26, 1979 is reported at 599 F.2d 151, and is reproduced in the Appendices to the Petition for a Writ of Certiorari dated September 11, 1979 (bound separately, and referred to herein as "Pet App.") at A-1 *et seq.* The opinion of the Court of Appeals was accompanied by an unpublished order dated April 26, 1979 which was

not officially reported, but which is unofficially reported at 13 E.R.C. 1069 and reproduced at Pet. App. B-1 *et seq.* An order denying a petition by the State of Illinois for a rehearing was entered by the Court of Appeals on June 14, 1979 and is reproduced at Pet. App. C-1 *et seq.* The judgment order entered by the United States District Court for the Northern District of Illinois on November 15, 1977 is reproduced at Pet. App. D-1 *et seq.* A stipulation between the parties dated November 14, 1977 concerning the District Court's November 15, 1977 judgment order is reproduced at Pet. Opp. E-1 *et seq.* The modified judgment order entered by the United States District Court for the Northern District of Illinois on January 31, 1980 is reproduced in the Joint Appendix (bound separately, and referred to herein as "App.") at 357 *et seq.* ———. (This modified judgment was entered after the issuance of the mandate of the Court of Appeals. The question whether this modified judgment is in accord with the mandate is presently before the Court of Appeals, but proceedings have been stayed pending the Supreme Court's decision in this case.) The opinion of the District Court at the conclusion of the trial on July 29, 1977 was not reported and is reproduced at Pet. App. F-1 *et seq.* The opinion of the District Court dated November 1, 1973 denying petitioners' motion to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure is reported at 366 F.Supp. 298 and is reproduced at Pet. App G-1 *et seq.* The opinion of the District Court dated November 16, 1972 denying petitioners' motion to dismiss for lack of personal jurisdiction and improper venue was not officially reported but is unofficially reported at 4 E.R.C. 1849, and is reproduced at Pet. App. H-1 *et seq.*

Mr. Justice Stevens' May 8, 1980 order staying all judgments, decrees and orders entered by the Court of Appeals and the District Court pending the Supreme Court's decision in this case is reproduced at App. 369.

This proceeding had its genesis in this Court's decision in *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972), reproduced at Pet. App. I-1 *et seq.*

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on April 26, 1979. A timely petition for rehearing was denied on June 14, 1979. The petition for writ of certiorari was filed on September 11, 1979, and was granted by this Court on March 17, 1980. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1) and Rule 22(3) of the Supreme Court Rules.

STATUTORY PROVISIONS INVOLVED

1. The Federal Water Pollution Control Act, as amended, 33 U.S.C §§ 1251-1376, is lengthy, and its pertinent provisions are therefore set forth at Pet. App. J-1 *et seq.*

2. Section 17 of the Illinois Civil Practice Act, Ill. Rev. Stat. ch. 110, § 17 (1971), provided in pertinent part as follows at the date the instant action was commenced (it has not been amended in any pertinent respect since then):

> "(1) Any person, whether or not a citizen or resident of this State, who in person or through agent does any of the acts hereinafter enumerated, thereby submits such person . . . to the jurisdiction of the courts of this State as to

any cause of action arising from the doing of any such acts:

* * *

(b) The commission of a tortious act within this State."

3. 28 U.S.C. 1391(b) states:

"A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

QUESTIONS PRESENTED

1. Do federal statutes and federal regulations control the federal common law of water pollution nuisance, now that Congress has adopted the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act of 1977, acts intended to provide uniformity, finality and an effective remedy to all persons including states in the field of water pollution control, and to assure that similar point sources with similar characteristics will be required to meet similar effluent limitations, by providing for regulatory control of point source discharges by an agency better equipped for the purpose than the courts by reason of specialization, experience and expertise?

2. May the courts conclude that a federal common law nuisance has been established where the trial court found that: (1) fecal coliform counts on Illinois' Lake Michigan beaches failed to demonstrate any pollution coming from Milwaukee; (2) there is no evidence of any outbreak of water-related diseases

in Illinois; (3) there is no evidence that any specific algal, taste or odor problem is attributable to Milwaukee's discharges; (4) it is impossible to measure accurately any effect on the lake caused by Milwaukee's discharges or to measure accurately the diminution in the amount of nutrients in the lake if they were altogether discontinued; and (5) plaintiffs failed to perform studies which they could and should have performed to determine whether pathogens and pollutants in Milwaukee's sewage effluents actually reached plaintiffs' waters?

3. May the courts hold that a federal common law nuisance has been established solely upon expert testimony regarding the theoretical possibility of exposure to relatively short incubation period enteroviral diseases, where the activity posing the theoretical possibility of exposure has existed for many decades, but the trial court expressly found that there is no evidence of any outbreak of any enteroviral disease?

4. May the courts hold that Milwaukee is creating a federal common law nuisance on the basis of express findings by the trial court that: (1) Milwaukee's nutrient discharges to the lake cannot be isolated out, either legally or factually; (2) balancing the equities is difficult to apply because each dollar of expenditure for better sewage treatment cannot be shown to result in a specific amount of benefit to the lake; (3) there is no evidence of Milwaukee's discharges having a present effect on fish life; (4) there is no evidence of any specific algal, taste or odor problem attributable to Milwaukee; and (5) nutrients from many sources, only some of which

emanate from Milwaukee, are causing accelerated eutrophication of the lake?

5. Where federal statutory and administrative provisions establish a federal policy to require a cost-effective approach to pollution control, may the trial court expressly refuse to consider costs and cost-effective considerations, and instead fashion a remedy without any regard whatsoever to such matters?

6. Where the defendants did nothing in the forum state and nothing to avail themselves of the law or of the privilege of conducting activities within that state, did the federal district court located in the forum state have personal jurisdiction over the defendants and did venue properly lie in the Northern District of Illinois?

STATEMENT OF THE CASE

This case had its origin in the Supreme Court's decision in *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972). It presents the first opportunity for this Court to define the scope of its decision in *Illinois* v. *Milwaukee* in light of the subsequent enactment of the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act of 1977, and implementation of the nationwide regulatory and funding program created by Congress in that legislation. The decision in this case will determine whether your petitioners, the City of Milwaukee, the Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee (cumulatively, "Milwaukee"), must spend, and if so when they

must spend, literally hundreds of millions of dollars over and above what is required under pollution discharge permits issued pursuant to the new federal statutes. The Court's decision will affect the expenditure of tens of billions of dollars by municipalities across the nation.

In *Illinois* v. *Milwaukee, supra,* the State of Illinois filed a motion for leave to file a complaint under the Supreme Court's original jurisdiction against four cities and two local sewerage commissions of the State of Wisconsin, alleging that the defendants were polluting Lake Michigan, an interstate body of water, and seeking the abatement of the alleged public nuisance. The Court denied the motion for leave to file under the Court's original jurisdiction without prejudice to the right of the State of Illinois to file an action in an appropriate United States District Court. The Court noted that the basis of such an action would be "federal common law", 406 U.S. at 103 (Pet. I-12); that, as of the time of the decision, the federal statutes and regulations provided only for "long-drawn-out" abatement procedures which were not inconsistent with the application of a federal common law to abate a public nuisance in interstate or navigable waters, (*Id.*); *but* that "new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance." 406 U.S. at 107 (Pet. App. I-16).

On May 19, 1972, shortly after the Supreme Court's decision, the State of Illinois commenced the present action in the United States District Court for the Northern District of Illinois.

Five months later, on October 18, 1972, Congress enacted PL 92-500, the Federal Water Pollution Con-

trol Act Amendments of 1972 (the "1972 Act").[1] That enactment substantially replaced the previous language of the Federal Water Pollution Control Act refered to in the Supreme Court's decision, including the Water Quality Act of 1965, the Clean Water Restoration Act of 1966, and the Water Quality Improvement Act of 1970, all of which were amendments to the initial Federal Water Pollution Control Act passed in 1948.

On December 27, 1977, shortly after the entry of the trial court's judgment in this action, Congress enacted and the President signed the Clean Water Act of 1977 (the "1977 Act"), PL 95-217, which amended FWPCA in certain important respects. Among many other changes, Section 41 of the 1977 Act added new Sec. 217 (§ 1297):

> "Any guidelines for cost-effectiveness analysis published by the Administrator under this title shall provide for the identification and selection of cost effective alternatives to comply with the objective and goals of this Act and sections 201 (b), (201d), 201(g)(2)(A), and 301(b)(2)(B) [§§ 1281(b), 1281(d), 1281(g)(2)(A), and 1311 (b)(2)(B)] of this Act."

Thus, Congress dealt with the precise subject matter of this action *before* judgment was entered below, and refined the congressional mandate *after* judgment was entered.

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[1] The Federal Water Pollution Control Act, as amended, is codified in 33 U.S.C. §§ 1251-1376. For ease of cross-reference, the U.S.C. § numbers will be set out in parentheses after the Act's section numbers; viz.: Sec. 301 (§ 1311). The present Federal Water Pollution Control Act, as amended, is referred to herein as either "the Act" or "FWPCA."

A. Description of the Metropolitan Milwaukee Sewerage System and Its Discharge Permit History

Each of the petitioners is a municipal body corporate organized and existing under the laws of the State of Wisconsin.[2]

Although each has separate functions, taken together the petitioners construct, operate and maintain sewer facilities which serve all of Milwaukee County, Wisconsin (except for the City of South Milwaukee). The area served ("Metropolitan Milwaukee Area") is approximately 420 square miles and has a population in excess of 1 million persons (Trial Transcript pp. 9262-9267).

The facilities operated by the petitioners to serve the Metropolitan Milwaukee Area include a series of sewer systems [3] and two sewage treatment plants. The Metropolitan Sewerage Commission of the County of Milwaukee ("Metropolitan Commission") constructs sewers in the Metropolitan Milwaukee Area outside of the City of Milwaukee. Upon completion, sewers constructed by the Metropolitan Commission are transferred to the Sewerage Commission of the City of Milwaukee ("City Commission") which thereafter operates and maintains them along with sewers which it has constructed in the City of Milwaukee. The City Commission also operates and maintains the two sewage

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[2] With respect to the petitioning commissions, see Wis. Stats. §§ 59.96(1) and 62.60-.67 (1977).

[3] Sewer systems may be "separated" systems, in which only sanitary sewage is collected and treated, or "combined" systems which gather both sanitary sewage and storm water runoff and transport them in the same conduits for treatment. Combined systems overflow when their capacities are exceeded because of the presence of large amounts of storm water.

treatment plants. The City of Milwaukee operates and maintains some sewers in the City of Milwaukee.

The two sewage treatment plants, which are respectively 25 and 39 miles from the Illinois border, are designed to provide "secondary" treatment[4] for sewage effluent discharges (e.g., D.Ex. 84, Tr. 4843, Tr. 13628; P.Ex. 89-90, Tr. 693 and 754).[5] The effluent discharge from the main sewage treatment plant is made to Lake Michigan inside of a man-made breakwater three miles from the nearest Milwaukee drinking water intake (D.Ex. 504, Tr. 4024). Other sewage effluent discharges are made from the other plant directly into the lake approximately eight miles from the nearest Milwaukee drinking water intake and approximately one and one-half miles from the drinking water intake of Oak Creek, Wisconsin, and from time to time directly into tributary streams of Lake Michigan from designated "overflow" points in the sewage collection system. (*Id.*)[6] Even with this close juxtaposition of drinking water intakes and effluent points, there is no record showing that the Milwaukee area has experienced en-

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[4] See 599 F.2d at 173-174 (Pet. App. A-40) for a description of "secondary treatment."

[5] References to the trial transcript herein are as follows: "Tr. ——". All exhibits identified by the parties were admitted into evidence at Tr. 13628 except for exhibits specifically excluded by the trial court. Accordingly, record references herein in connection with exhibits specify those places where such exhibits were identified.

[6] "Overflow" is defined in the Judgment Order from which this appeal arises as "a crossover, bypass, diversion structure, relief structure, pump station or any other device or mechanism by which human fecal waste is discharged directly or indirectly to public streams, rivers or lakes without collection and treatment" according to specified standards (Pet. App. D-2).

teroviral or bacterial epidemics, or even minor outbreaks of such diseases.

In 1974 the petitioning City Commission and the City of Milwaukee applied to the State of Wisconsin Department of Natural Resources ("DNR") for permits to discharge the described sewage effluent into Lake Michigan and certain tributary streams in Milwaukee County. Such applications were made pursuant to FWPCA, and procedures adopted thereunder.

Prior to receiving such permit applications, DNR qualified under Section 402 (§ 1342) of FWPCA as a discharge permit-granting agency under the superintending jurisdiction of the United States Environmental Protection Agency ("EPA"). Each and every action of DNR in the premises was in accordance with the requirements of FWPCA and was tacitly or actively approved by EPA (Tr. 9323).

In late 1974, following public notice, including notice to each of the respondents pursuant to Sec. 402 (b)(3) (§ 1342(b)(3)) of FWPCA and hearing (none of the respondents chose to participate therein), DNR issued discharge permits to the City Commission and the City of Milwaukee under which they have operated, are operating, and at all times material herein were operating the sewer system and treatment plants serving the Metropolitan Milwaukee Area. (P.Ex. 62-64, App. 371-454, Tr. 257; D.Ex. 1110, Tr. 7508.)

The permits issued by DNR established specific requirements and parameters for the sewage effluent discharges of the City Commission and the City of Milwaukee. The permit also established timetables for the attainment of such requirements and parameters, pro-

vided for monitoring for compliance, and contemplated enforcement of their terms. (*Id.*)

The City Commission failed in some respects to fully comply with its permit requirements. Pursuant to the permit enforcement authority specified by Sec. 402(b) (§ 1342(b)) of FWPCA, the DNR effectuated enforcement proceedings in Dane County Circuit Court, Dane County, Wisconsin, in an action entitled *The Sewerage Commission of the City of Milwaukee and Metropolitan Sewerage Commission of the County of Milwaukee* v. *State of Wisconsin Department of Natural Resources* (Case No. 152-1342). The permit enforcement action resulted in the entry on May 25, 1977 of a judgment enforcing the City Commission's discharge permit requirements and providing comprehensive timetables for making necessary improvements, including the correction of wet-weather overflows from Milwaukee's combined sewer area (D.Ex. 1311, App. 455-488, Tr. 9417 [renumbered from D.Ex. 1211 to D.Ex. 1311 at Tr. 9720], the "Dane County Order").

Insofar as material here, the discharge permit requirements imposed on Milwaukee, as implemented by the Dane County Order, include the following:

1. Secondary treatment shall be provided for all effluents processed in sewage treatment plants operated by Milwaukee.

2. The secondary treatment shall cause the effluent discharges from the treatment plants to contain no more than 30 parts per million ("30 PPM" or "30 mg/l") suspended solids ("SS") based on a 30 day average, no more than 30 PPM of carbonaceous 5 day biochemical oxygen demand ("BOD_5") based on a 30 day average, no more than 1 PPM phosphorus ("P") based on a 30

day average, and no more than 200 fecal coliform per 100 milliliters based on a 30 day average.

3. Chlorination shall be provided at certain times, but no requirement is imposed as to chlorine residuals.

4. Elimination of dry-weather overflows throughout the system and correction or control of storm induced combined sewer overflows ("CSO") in the combined sewer area is required. Specific relief provisions related to the availability and provision of state and federal funding are included relating to CSO and some sewer extensions, with provision for certain deadline extensions so long as $13 million per year for the combined sewer overflow program and $15 million per year for sewer extensions measured in 1976 dollars of local funds are being expended. (P.Ex. 62-63, App. 371-421, Tr. 257; D.Ex. 1110, Tr. 7508, and D.Ex. 1311, Tr. 9417.)

The cost-effective character of the "correction or control" of CSO required in the permits, and the dependency upon the availability of federal funds, reflect the mandate of the federal statute and are absent in the decisions below.

It must be emphasized that the Dane County Order calls for correction or control of combined sewer overflows. The Dane County Order will be enforced to guarantee the correction or control of combined sewer overflows. The Dane County order is also "cost sensitive" in that combined sewer overflows were recognized by the parties to be only a portion of the problem faced by Milwaukee and that combined sewer overflows, once several major overflow points were eliminated, would have a lesser priority than other remedial work being undertaken by Milwaukee. For that reason, the Dane

County order was drafted to require continuous progress toward control of combined sewer overflows on a schedule which reflected the fact that federal funds might not be available in certain years in the quantity necessary for optimum progress. (*Id.*)

B. Procedural History

This case commenced on May 19, 1972, shortly after this Court's decision in *Illinois* v. *Milwaukee, supra.* The Illinois' complaint (App. 23-32) was served upon the defendants pursuant to the Illinois long-arm statute, Ill. Rev. Stat. ch. 110, § 17 (1971) (see "Statutory Provisions Involved," *supra*). Subsequent to service of the complaint, Milwaukee moved to dismiss the action on the ground that the trial court lacked personal jurisdiction, and that venue of the action did not properly lie in the Northern District of Illinois. The District Court denied these motions. *Illinois* v. *Milwaukee,* 4 E.R.C. 1849 (N.D. Ill. 1972) (Pet. App. H-1 *et seq.*). Milwaukee then moved to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. This motion was also denied. *Illinois* v. *Milwaukee,* 366 F.Supp. 298 (N.D. Ill. 1973) (Pet. App. G-1 *et seq.*).

Trial to the court commenced on January 11, 1977. It spanned six months, produced over 14,000 pages of transcript, hundreds of exhibits, and focused upon highly technical subject matter requiring extensive use of expert testimony in attempts to explain, teach and interpret complex scientific issues in such fields as limnology, oceanography and virology, as well as sophisticated engineering concepts. The respondents' experts limited themselves to theorizing to their conclusions, but Milwaukee's experts reviewed actual tests

performed by the Milwaukee experts in Lake Michigan, as well as reviewing the applicable scientific theories. It was in this setting that the trial court, at the conclusion of the case, rejected briefs and dictated a decision from the bench. In the trial court's words:

> "Ordinarily, when the trier of facts weighs evidence and attempts to come to factual conclusions, he does so in the light of his own experience and his own observations and his own common sense. Not only is this proper to do, it is something that we specifically instruct juries to do in every jury case.
>
> The nature of the subject matter here, however, is such that my own experience and observations in life are of relatively little use to me. It is well known to all of us that the arcane subject matter of some of the expert testimony in this case was sometimes over the heads of all of us to one height or another. I would be certainly less than candid if I did not acknowledge that my grasp of some of the testimony was less complete than I would like it to be, but short of enrolling in a university course directed toward a reorientation of my entire education and spending the years that that would involve, I know of no remedy for the problem." (Pet. App. F-3 and 4.)

Significantly, the trial court did not, as a "remedy for the problem," defer to the expertise of the administrative body set up by Congress to deal with the subject.

In subsequent hearings before the District Court on September 9, 1977 and November 14, 1977, where the remedy was under consideration, the District Court clearly indicated that the two previously imposed requirements of the court, i.e., (1) to completely "elimi-

nate" all overflows; and (2) to meet the effluent limitations specified by the court,[7] were both to be applicable without respect to their costs, without benefit of any cost-effective analysis and without regard to the availability of federal funding under FWPCA, which funding is limited to cost-effective solutions to pollution control (Transcript of September 9, 1977 hearing before the District Court at 107-111; Transcript of November 14, 1977 hearing before the District Court at 38 and 56). Thus, the District Court precluded evidence on cost-effective methods of controlling sewer overflows.

C. Decision of the District Court and the Court of Appeals

During the trial the State of Illinois failed to call a single witness who had any direct responsibility for public health in that state. The witnesses presented by Illinois had no specific experience with public health in the State of Illinois, the City of Milwaukee or Lake Michigan. They were witnesses who were qualified as "experts," who testified with respect to general scientific principles, and who reached conclusions therefrom with respect to Illinois, Milwaukee and Lake Michigan. While the District Court favorably commented upon the credentials of all of the expert witnesses who testified at the trial, the court also noted that all of the witnesses were interested in the outcome of the case and none of them were neutral as between the parties or as to the outcome of the case (Pet. App. F-4). The determination of liability and remedy to be imposed

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[7] This portion of the District Court judgment was reversed by the Court of Appeals, 599 F.2d at 177 (Pet. App. A-48), and Milwaukee seeks review only of the requirement to eliminate all sewer overflows.

upon Milwaukee was reached in the face of the following express findings by the District Court:

1. The State of Illinois could have performed studies to determine whether Milwaukee sewage effluents are sufficiently diluted by Lake Michigan or inactivated by other means so that only insignificant numbers of pathogens and other pollutants, if any, could reach Illinois waters. Illinois elected not to do so, and in so electing chose to produce less evidence than it should have (Pet. App. F-10).

2. There are fecal coliform counts on Illinois beaches which fail to demonstrate any pollution coming from Milwaukee (Pet. App. F-11).

3. There is no evidence of any outbreak of water-related diseases in Illinois (Pet. App. F-12).

4. There is no evidence of any present effect of Milwaukee discharges or, for that matter, of the effect of any other nutrient discharges, on fish life in the lake (Pet. App. F-18).

5. There is no evidence that any specific algal prob-- lem or any specific taste and odor problem experienced by residents of Illinois or Michigan is attributable to Milwaukee sewage as opposed to the nutrients discharged by any other point or non-point sourse. (*Id.*)

6. It is impossible to measure accurately any effect on the lake caused by Milwaukee's discharges, or to measure accurately the diminution in the amount of nutrients in the lake which would result if Milwaukee discharges were altogether discontinued (Pet. App. F-19).

Based on this record, the District Court entered judgment in favor of the plaintiffs. The judgment ordered essentially two basic remedies (Pet. App. D-1 *et seq.*). The first required Milwaukee to treat all sewage at all times in compliance with effluent limitations many times more stringent than those imposed pursuant to FWPCA and requiring an additional treatment process known as "advanced wastewater treatment" to be constructed and operated over and above the statutorily mandated secondary treatment.[8] The second basic remedy required Milwaukee to construct a sewage conveyance, storage and treatment facility having the capacity to "eliminate" all overflows of sewage from combined sanitary and storm sewers during periods of wet weather. The system was to be large enough to permit advanced waste treatment of water from any storm up to the size of the largest storm in Milwaukee's historical record, and to permit the treatment of any overflows which may conceivably occur from a storm larger than the largest storm in that history with "bar screens, followed by drum screens, followed by chlorination prior to discharge."

The Court of Appeals dealt with the two basic parts of the District Court judgment separately. It reversed the District Court's order insofar as it imposed effluent limitations more stringent than those required by FWPCA, which reversal eliminated the need to construct advanced waste treatment facilities required to meet the reversed effluent limitations. However, the Court of Appeals affirmed the District Court's order to the extent that the order required the "elimination" of all sewage overflows during wet weather periods on the

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[8] Generally, "advanced wastewater treatment" refers to tertiary treatment processes requiring additional capital facilities.

basis—unsupported in the record—that Milwaukee's "discharges of raw sewage . . . pose a significant risk of injury to Illinois residents. . . . no one even attempts to justify such discharges as harmless or insignificant." 599 F.2d at 177 (Pet. App. A-47). That holding left intact the need to undertake a massive construction program to build additional sewage collection, transport and treatment facilities without regard to the costs of elimination of overflows as distinguished from the control of overflows. (See discussion *infra* at 56-63).

D. Non-cost-effective Elimination of Overflows Was Ordered by the Courts Below

The concept of control of sewer overflows versus the concept of elimination of sewer overflows mandated by the courts below, reflects and describes the basic and fundamental difference between the cost-effective solution to sewer overflows enacted by Congress and the remedy ordered by the courts below. Any sewer system, including its treatment plants, has inherent storage capacity. When that capacity is exceeded, it overflows.

Any sewer system has the capacity to contain and process in the pipes, conduits, tunnels and plants which constitute the system a volume much greater than the dry-weather flow to the system. It follows that overflows occur when the system is affected by a storm event. A "controlled" sewer system is designed to contain at least the "first flush" of storm water. This means that when overflows occur in a properly "controlled" system, they occur after the system's stored pollutants have been flushed to and treated in the treatment plants of the system, and that the overflow-

ing liquids from a "controlled" system are largely storm water runoff.

Congress and the EPA, the administrative agency designated by FWPCA to administer water pollution control activities under the Act, recognize this factor in providing for "control" of sewer overflows on a cost-effective basis. In essence, the permits granted under FWPCA establish a level of protection of the nation's waters by mandating sufficient volume capacity in a "controlled" sewer system to prevent overflows until a particular magnitude of storm event occurs, usually the "six month" or "two year" storm depending on the specifics of the system and the waters into which the discharge will be made. The amount of control imposed, i.e., the storm event planned for, is related to the costs of the degree of control required to meet the water quality requirements of the receiving waters and the other circumstances of the particular system.

In contrast to the legislative "control" approach, the approach of the courts below was to *eliminate* overflows by ordering the construction of mammoth storage capacity with attendant pumping and other facilities, regardless of cost, regardless of the fact that overflows caused by storms of rare magnitude can be eliminated only at enormous cost, and regardless of any demonstrated necessity of doing so to protect public health.

Congress has recognized the law of diminishing returns, and the regulatory permit system it established provides for control of overflows from sewer systems so as to prevent the discharge of the vast majority of pollutants, while keeping costs in perspective. The courts below, however, have ignored the concepts of

cost-effectiveness in favor of total elimination without regard either to costs incurred or benefits secured.

SUMMARY OF ARGUMENT

I.

When this Court decided *Illinois* v. *Milwaukee, supra,* the federal statute dealing with water pollution was weak and ineffective. This Court therefore promulgated the federal common law of water pollution nuisance which, the Court recognized, controlled over state law and was subject to Congressional act and preemption.

Before this Court decided *Illinois* v. *Milwaukee,* Congress was addressing the same weaknesses which concerned this Court. The result was PL 92-500 (the 1972 Act), enacted only five months after the decision. The statute provides for readily enforceable effluent limitations. Administered by an expert administrative agency, the Act established an effective, comprehensive, uniform and nationwide statutory and regulatory framework for controlling water pollution resulting from "point source discharges". Under the 1972 Act, point source discharges are allowed only when made in compliance with the terms of a permit issued pursuant to the Act.

The 1972 Act was amended by PL 95-217 in 1977, which added the concept that pollution control measures should be cost-effective, i.e., the benefits achieved should justify the costs incurred. The 1977 Act also provided for extensions of time where failure to achieve mandated controls resulted from the unavailability of federal funds.

Under the 1972 Act, Illinois and Michigan had available to them a number of meaningful statutory remedies pursuant to which they could have sought all relief which they sought in the District Court. Illinois and Michigan failed to pursue and exhaust any of these remedies, and the District Court, which candidly recognized its own inability to grasp some of the testimony on the arcane subject matter involved, failed to recognize and defer to the primary jurisdiction of the expert administrative agency designated by Congress to administer the Act.

Instead, the District Court found a nuisance based solely upon the disputed opinions of expert witnesses, in the absence of *any* empirical evidence of harm to Illinois or Michigan. The District Court then imposed a mandatory injunction upon Milwaukee requiring it to *eliminate* all sewer overflows, whereas the permits issued to Milwaukee pursuant to the Act and a state court judgment enforcing such permits only require Milwaukee to *correct and control* sewer overflows.

The District Court precluded evidence dealing with practicable means of controlling sewer overflows short of complete elimination, and evidence dealing with the monumental costs of, and the lack of cost-effectiveness of, complete elimination of sewer overflows. The District Court consequently precluded any possibility of balancing the equities and hardships in formulating the terms of the mandatory injunction it granted, or of making any determination that the relief awarded was cost-effective. In affirming the District Court's order to eliminate all sewer overflows, the Court of Appeals relied in part upon the absence of the very evidence which the District Court precluded.

Congress and the Environmental Protection Agency require cost-effective "control" of sewer overflows. The amount of control imposed, i.e., the amount of capacity designed into the sewer system to prevent overflows until some particular magnitude of storm event occurs, such as the "two-year" storm, is related to the costs of achieving the degree of control required to meet water quality requirements of the receiving waters and other circumstances of the particular system. In contrast to the legislative-administrative "control" approach, the courts below ordered complete elimination, requiring the construction of mammoth storage and pumping facilities, regardless of the enormous costs involved and the greatly diminished returns of eliminating infrequent overflows caused by rare storm events, and regardless of the lack of any demonstrated necessity of doing so to protect Illinois and Michigan.

In a combined sewer system, where both sanitary sewage and storm water runoff are collected and transported in the same conduits to the treatment plant, overflows typically occur when the storage capacity of the system is exceeded during a storm event. A "controlled" sewer system is one which is designed to contain at least the "first flush" of storm water. When overflows occur in a properly "controlled" system, they occur after the system's stored pollutants have been flushed to the treatment plant, so that the overflowing liquids consist largely of storm water runoff.

A state court judgment to which Milwaukee is subject guarantees that the permit requirements to control sewer overflows will be enforced. The additional requirement to eliminate overflows, imposed by the courts below, will achieve little additional pollution

reduction, and only at an additional cost to Milwaukee of hundreds of millions of dollars. Most of the major cities of this country are plagued with sewer overflow problems. The additional cost of eliminating (as distinguished from controlling) sewer overflows across the nation (which are permitted by Illinois and Michigan in their own jurisdictions) will be tens of billions of dollars.

Illinois' federal common law nuisance claim against Milwaukee is completely controlled by FWPCA. It is clear the 1972 Act, as amended by the 1977 Act, now constitutes the federal law applicable to interstate water pollution disputes. It provides uniformity, finality and enforceability. Uniformity is achieved through uniform limitations, standards and procedures, administered by an expert administrative agency. Finality is achieved because EPA action becomes final and uncontestable unless review is sought within 90 days. Further, compliance with the terms of a permit issued under FWPCA is deemed to be compliance with the Act. Enforceability is achieved through a number of provisions which were purposefully designed to encourage the participation of all interested persons, private individuals to states, in each stage of the regulatory process, including establishment of limitations and standards, granting of permits, and assuring compliance with the permits.

In the face of this comprehensive legislative scheme, the federal courts should have no power to substitute their own notions of what the federal law of interstate water pollution control should be on an *ad hoc,* case-by-case basis, and certainly the federal courts should not provide far-reaching injunction remedies under

the federal common law when adequate federal statutory remedies are available.

II.

Without respect to the impact of FWPCA on the federal common law of nuisance, the respondents failed to prove the existence of a nuisance. The determination of liability and the remedy to be imposed upon Milwaukee in this case was reached in the face of the following express findings by the District Court:

1. The State of Illinois could have performed studies to determine whether Milwaukee sewage effluents are sufficiently diluted by Lake Michigan or inactivated by other means so that only insignificant numbers of pathogens and other pollutants, if any, could reach Illinois waters. Illinois elected not to do so, and in so electing chose to produce less evidence than it should have.

2. There are fecal coliform counts on Illinois beaches which fail to demonstrate any pollution coming from Milwaukee.

3. There is no evidence of any outbreak of water-related diseases in Illinois.

4. There is no evidence of any present effect of Illinois discharges or, for that matter, of the effect of any other nutrient discharges on fish life in the lake.

5. There is no evidence that any specific algal problem or any specific taste and odor problem experienced by residents of Illinois or Michigan is attributable to Milwaukee sewage as opposed to

the nutrients discharged by any other point or non-point source.

6. It is impossible to measure accurately any effect on the lake caused by Milwaukee's discharges, or to measure accurately the diminution in the amount of nutrients in the lake which would result if Milwaukee discharges were altogether discontinued.

Certainly, if there were any merit to the speculated hazard, there would be *some* empirical evidence of its existence resulting from Milwaukee's discharges to Lake Michigan over a period of more than 100 years. There is nothing! No witness could place a single pathogen in Illinois or Michigan waters! Illinois relies entirely upon the disputed theories of experts. In prior cases before this Court involving alleged interstate water pollution nuisance, evidence considerably stronger than that existing in this case was found insufficient and resulted in a dismissal.

If the hazards which Illinois and Michigan allege are posed by Milwaukee's overflows were truly a concern, both Illinois and Michigan would require the elimination of all overflows in their own jurisdictions to protect their own citizens. In fact, neither Illinois nor Michigan requires the total elimination of all overflows as ordered by the courts below. The imposition of such a burden on Milwaukee at the behest of sovereign states which do not impose similar burdens on their own

citizens cannot be justified by reliance upon federal common law.

III.

The Illinois' complaint herein was served upon the petitioners pursuant to the Illinois "long-arm" statute which provides for personal jurisdiction in the event of "a tortious act within" the State of Illinois. The facts of this case clearly establish that none of the petitioners have acted in any way which would justify the conclusion that they committed a tortious act within the State of Illinois, or that they had the requisite "minimal contacts" with the State of Illinois to satisfy the constitutional prerequisite of due process of law.

IV.

The courts below erroneously relied upon the words "or in which the claim arose" in determining that venue was proper in the Northern District of Illinois "where the injury was suffered." To the contrary, the claims made against Milwaukee were "local," with the locus being their source. Further, all of the conduct complained of occurred in the Eastern District of Wisconsin. Very few of the witnesses (included respondents' witnesses) resided in the district of trial. Many of Milwaukee's witnesses and all of the petitioners reside in the Eastern District of Wisconsin, not in the Northern District of Illinois. Consequently, venue was improperly laid in the Northern District of Illinois.

ARGUMENT

I. IN PL 92-500, AS AMENDED BY PL 95-217, CONGRESS HAS MADE THE LEGISLATIVE CHOICE TO CONTROL WATER POLLUTION BY MEANS OF A COMPREHENSIVE, COST-EFFECTIVE FEDERAL SCHEME WHICH IS DEPENDENT UPON UNIFORM STANDARDS AND PROCEDURES ADMINISTERED BY AN EXPERT ADMINISTRATIVE AGENCY. IN IGNORING THE UNIFORM STATUTORY STANDARDS, PROCEDURES, AND THE COSTS OF THE REMEDY IMPOSED, THE COURTS BELOW HAVE ELEVATED FEDERAL COMMON LAW ABOVE FEDERAL STATUTORY LAW CONTROLLING INTERSTATE WASTEWATER DISCHARGES.

A. The Necessity for Federal Common Law Independent of an Ineffective Federal Statute No Longer Exists.[9]

From 1948 until 1972, when this Court decided *Illinois* v. *Milwaukee, supra,* the federal statutes dealing with water pollution control were weak and ineffective, relying basically upon state-developed ambient "water quality" standards, i.e., standards specifying

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[9] The chronological progression of key events in the legislative history of FWPCA refutes any argument that Congress intended to preserve the federal common law of nuisance as distinguished from state common law. The debates in the House and Senate and the drafting of the language of the 1972 Act, excepting only that which occurred in conference, took place prior to the Court's decision in *Illinois* v. *Milwaukee, supra,* and at a time when this Court's decision in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971) clearly indicated that it was *state* common law that was applicable. It was only after the legislative draftsmanship had occurred but immediately before enactment of the 1972 Act that this Court acted to fashion the *federal* common law of nuisance. Thus, this Court acted before the 1972 Act in light of the ineffective legislation then in place, while Congress, in framing the 1972 Act, acted as to its operative legislative history in the light of *Wyandotte* even though formal enactment of the 1972 Act occurred immediately after the decision in *Illinois* v. *Milwaukee, supra.* It is significant that throughout the entire legislative history there is not one single mention of the *federal* common law, not surprising in view of the historical record.

the characteristics which must be maintained in the water into which discharges are made. A conference procedure was available among representatives of the state and federal authorities to establish standards if those set by the state were unacceptably low (former Sec. 10(c)(2) (§ 1160(c) (2)). Enforcement was possible only where a discharge resulted in a reduction of water quality below the specified ambient level (former Sec. 10(c)(5) (§ 1160(c)(5)). However, federal initiative was limited to interstate pollution endangering health or welfare, and then only after a six-month wait and administrative hearing. Only if the conference and hearing stages failed to bring acceptable results could an abatement suit be brought by federal authorities (former Sec. 10(g) (§ 1160(g)). The act contained two major weaknesses: (1) the use of ambient standards rather than discharge standards, and (2) ineffective enforcement provisions. Ambient standards could be based on stated legitimate uses of water, including agricultural and industrial uses. Thus, the standards might reflect the lowest legitimate use—that quality of water necessary for industrial purposes.

Before this Court expressed its concerns about the weaknesses of the then existing federal water pollution statutes in *Illinois* v. *Milwaukee, supra,* Congress began addressing those same concerns. The result was PL 92-500 (the 1972 Act), enacted only five months after the decision, which provided an effective, comprehensive, uniform, national statutory and regulatory framework for the control of water pollution. The keystones to this framework—which controls *all* "point source discharges"—are the complementary concepts that point source discharges are *not* allowed without a permit, and that discharges made in compliance with

the terms of a permit *are* allowed. (Sec. 301 *et seq.* (§ 1311 *et seq.*)). For a general discussion of the terms of the 1972 Act, see *Environmental Protection Agency* v. *California,* 426 U.S. 200 (1976).

The applicability and viability of the federal common law of water pollution nuisance, fashioned by this Court in response to the inadequacies of the old statute, must now be reviewed in light of the subsequently enacted 1972 and 1977 Acts.

The Supreme Court's landmark decision *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 78 (1938), held that there is "no federal general common law."

While the language appeared to be absolute, the Court's decision in *Erie* has not prevented the development by federal courts of what Judge Friendly [10] has termed a "specialized" federal common law. However, the areas in which such development has occurred since the *Erie* decision are limited to cases where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism. For example, the Supreme Court has fashioned federal common law when it saw a need for a uniform rule with respect to commercial paper issued by the United States. *Clearfield Trust Co.* v. *United States,* 318 U.S. 363 (1943). The Court has fashioned federal common law when presented with issues left unanswered by a federal statutory scheme and the application of divergent state laws could frustrate the purposes of the statute. *Textile Workers Union of America* v. *Lincoln Mills,* 353 U.S. 448 (1957). The Court has fashioned federal common law

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[10] Friendly, *In Praise of Erie—And of the New Federal Common Law,* 39 N.Y.U.L.Rev. 383, 405 (1964).

in cases involving questions of international law where the application of varying state rules might impair the federal government's ability to exercise its power to conduct foreign affairs. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964).[11] Most important to this case, the Court fashioned federal common law in *Illinois* v. *Milwaukee, supra,* which involved a controversy between a state and a nonresident over alleged pollution of an interstate body of water. See also *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92 (1938).

Several principles are common to these post-*Erie* cases. First, federal common law is extraordinary. In *Wheeldin* v. *Wheeler,* 373 U.S. 647 (1963), Justice Douglas, the author of *Illinois* v. *Milwaukee, supra,* writing for the Supreme Court in that earlier decision, said:

> "As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co.* v. *Tompkins* (citation omitted). The instances where we have created federal common law are few and restricted." (Citing *Clearfield* and *Lincoln Mills* as examples), 373 U.S. at 651.

Second, like the common law of the states, federal common law is a law of first resort, subject to revision by subsequent legislation. Monaghan, *The Supreme Court, 1974 Term, Foreward: Constitutional Common Law,* 89 Harv.L.Rev. 1, 10-11 (1975). Finally, the

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[11] See, *generally,* Monaghan, *The Supreme Court, 1974 Term, Foreword: Constitutional Common Law,* 89 Harv.L.Rev. 1 (1975); Note, *Federal Common Law and Interstate Pollution,* 85 Harv.L. Rev. 1439 (1972).

federal common law that has emerged since *Erie* effects a complete ouster of state law in the area. Where federal concerns mandate the application of federal common law, that law preempts all state law, including state statutes, constitutions and judicial decisions, *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co., supra,* and the federal common law governs the issue whether it is raised in federal or state court. See Note, *Federal Common Law and Interstate Pollution,* 85 Harv.L.Rev. 1439, 1444 (1972).

The Supreme Court's decision in *Illinois* v. *Milwaukee, supra,* written by Justice Douglas, acknowledges these principles. The Court first established its then perceived need to carve an exception to *Erie.* The Court noted the need for uniformity, 406 U.S. at 105 n.6 and 107 n.9 (Pet. App. I-14 n.6 and 16 n.9), citing *Clearfield Trust, supra,* and *Texas* v. *Pankey,* 441 F.2d 236 (5th Cir. 1971); it noted that the then existing federal statutory scheme with respect to water pollution did not provide an adequate remedy for protection of *quasi*-sovereign interests, 406 U.S. at 102-103 (Pet. App. I-11 and 12), citing *Lincoln Mills, supra;* it noted the need to provide the states with an appropriate forum to peacefully resolve controversies involving *quasi*-sovereign interests which, had there not been a federal union, would in all likelihood have resulted in the use of force, 406 U.S. at 104 and 107 (Pet. App. I-13 and 16), citing *Missouri* v. *Illinois,* 200 U.S. 496 (1906); and the Court determined that federal common law, not state law, would control, thus preempting state statutory, constitutional and judicial law. See 406 U.S. at 102, 103 n.5 and 107 (Pet. App. I-11, 12 n.5 and 16).

However, the Supreme Court did not stop its analysis here. It went on to recognize that the federal common law it envisioned was subject to the legislative supremacy of Congress; that the Congress had the power to supplant judge-made federal common law through statute or regulation. The Court said:

> "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." 406 U.S. at 107 (Pet. App. I-16).

The quotation describes completely where this precise matter stood when the plaintiffs commenced their action. The Supreme Court had made all of the foregoing observations, many of them in *Illinois* v. *Milwaukee, supra,* but a most important change occurred when, five months later, Congress passed the Act. The very essence of that legislation was to provide a nationwide, uniform, comprehensive statutory scheme for preventing pollution of interstate waters, administered by an expert administrative agency having national interests and national priorities as its prime objective. The national interests overrode the parochial interests of the various states, but provision was made for the participation of all interested parties, including the states, to effectively voice their positions at both the administrative and judicial level.

The concern of the Supreme Court in *Illinois* v. *Milwaukee, supra*—that the states were without an effective remedy to deal with interstate water pollution —has been erased by the basic procedures and remedies created and made available to all interested parties, including states, by the 1972 Act. These insure participation in and an opportunity to be heard regarding estab-

lishment and enforcement of pollution control standards and limitations for interstate waters.

Analysis of the Act will show that Illinois and Michigan had open to them a number of remedies under the Act which equate precisely with the remedies sought in this action. First, they could have established more stringent water quality standards for their portion of Lake Michigan and recommended that Wisconsin impose more stringent effluent limitations in the Milwaukee permit, asserting that such limitations were necessary to meet or implement the Illinois and Michigan standards. Sec. 301(b)(1)(C) (§ 1311(b)(1)(C)), Sec. 303(c) (§ 1313(c)), Sec. 402(b)(5) (§ 1342(b)(5)). Second, they could have urged Wisconsin to establish more stringent water quality standards for the Wisconsin portion of Lake Michigan, either initially or during Wisconsin's periodic review of its standards, asserting a need to protect the public health and welfare or to avoid violation of Illinois' and Michigan's standards. Secs. 303(c)(1) and (2) (§ 1312(c)(1) and (2)), and 40 C.F.R. § 130.17(c)(4). Third, they could have requested and participated in public hearings on Milwaukee's permit applications and urged imposition of more stringent limitations to meet requirements of Illinois or Michigan water quality standards or other Illinois or Michigan law. Sec. 402(b)(3) (§ 1342(b)(3)) and Sec. 301(b)(1)(C) (§ 1311(b)(1)(C)). Fourth, they could have submitted written recommendations to Wisconsin with respect to Milwaukee's permit applications, and, if any part of their recommendations were not accepted, they could have requested the Administrator to veto Wisconsin's issuance of the permits and, if necessary, formulate the terms of an acceptable permit. Sec. 402(b(5) (§ 1342(b)(5)) and Sec.

402(d)(2)(A) (§ 1342(d)(2)(A)). Fifth, they could have requested the Administrator to promulgate water quality related effluent limitations under Section 302 (a) (§ 1312) for sewerage systems discharging into Lake Michigan, asserting that the existing effluent limitations would interfere with the attainment or maintenance of that water quality which assures protection of public water supplies, recreational activities and other legitimate uses. Hearings are provided for therein so that all affected parties may be heard. Finally, if Illinois or Michigan were dissatisfied with the results of any of these administrative procedures, they could have sought judicial review. Section 509(b)(1) (§ 1369) provides that any interested person may obtain a review of the Administrator's action: (1) in promulgating any effluent standard or treatment standard under Sec. 301 or 307 (§§ 1311, 1317) of the Act, or any standard or performance under Sec. 306 (§ 1316); (2) in making any determination with respect to a state permit program under Sec. 402(b) (§ 1342(b)); or (3) in issuing or denying a permit under Sec. 402 (§ 1342). Significantly, they chose to ignore each and every one of those courses open to them under the statute. There has been no pursuit of the administrative remedies! *See generally, McKart* v. *United States,* 395 U.S. 185, 194-195 (1969).

B. FWPCA Is Comprehensive, Effective and Complete. It Replaces the Former Federal Statutes Found to Be Ineffective.

It is clear that the 1972 and 1977 Acts constitute the federal law applicable to pollution of interstate waters. This legislation, enacted after this Court's decision in *Illinois* v. *Milwaukee, supra,* completely meets the concern of this Court that federal statutory law prior to

the 1972 Act failed to provide an adequate and effective basis for the resolution of interstate disputes. The essence of this legislation was to provide a comprehensive, uniform, nationwide statutory scheme for controlling pollution of interstate waters, administered by an expert administrative agency having national interests and priorities as its prime objective rather than parochial interests of the various states, but providing for the participation of all interested parties, including the states, at both the administrative and judicial levels.

As previously pointed out, in *Illinois* v. *Milwaukee, supra,* this Court said:

> "It may happen that *new federal laws* and new federal regulations *may in time pre-empt* the field of *federal common law* of nuisance." 406 U.S. at 107 (Pet. App. I-16) (emphasis added).

At that time, federal legislation attempted to deal with the subject matter of water resources by specifying water quality criteria for the receiving water. The water quality criteria approach was a total failure from the standpoint of administration and results. However, five months after the complaint herein was filed, Congress acted to preserve the nation's water resources by totally revamping the pertinent federal statutory framework so as to control the discharge of pollutants. Congress required *every* "point source" of wastewater discharge to be the subject of a federally authorized and supervised permit, issued under federal supervision by experts after public hearings, with all affected parties—including neighboring states—having the right to be heard and to be protected.

It is equally significant that within two months after the trial court decision, Congress refined its 1972 legis-

lation, making explicit statutory pronouncements on the importance of fiscal considerations. It requires *cost-effective* solutions to the problems of water pollution, clarifying national *goals* in the context of *federal funding* (Sec. 217 (§ 1297) of FWPCA).

(1) *Congress Chose Administrative Uniformity as the Federal Approach to Water Pollution Control.*

Congress, of course, had the power to choose among specific means to control the pollution of this nation's waters. The choices were many. Congress could have left full responsibility with the individual states. It could have designated the courts as the vehicle to establish and define the required standards of conduct on a case-by-case basis. Its choice, however, was the legislative-administrative partnership, with Congress supplying the objectives and general guidelines and an expert administrative agency making specific decisions regarding implementation.

Then Senator, now Secretary, Muskie viewed the problem as follows:

> "Senators will recall from the November debate on the Senate bill that there are three essential elements to it: Uniformity, finality, and enforceability. Without these elements a new law would not constitute any improvement on the old: We would not bring a conference agreement to the floor without them." *Legislative History* at p. 162.[12]

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[12] All citations to the legislative history are to "A Legislative History of the Water Pollution Control Act Amendments of 1972," prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (Committee Print 1973).

Thus, at the outset Congress recognized that the achievement of a "national" goal required the application of national, uniform standards of conduct, while at the same time recognizing the need for a uniform procedure for the establishment of more stringent standards when required. Uniformity of approach and administration had to be a keystone. Without nationally mandated uniformity, the parochial interests of the various states and their branches of government stood in the way of achieving the national objective. The legislative history of the 1972 Act makes this clear. For example, the Conference Report on the 1972 Act states:

> "Except as provided in section 301(c) [§ 1311 (c)] of this Act, [economic based variance from 1983 standard for industrial point source] the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines under subsection (b) of this section, so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations." *Legislative History* at 309.

The courts have acknowledged this Congressional mandate for uniformity. In *Natural Resources Defense Council, Inc.* v. *Train,* 510 F.2d 692, 711 (D.C. Cir. 1975), the court said:

> "The decentralization of permit issuing authority envisioned by section 402 [§ 1342] prompted concerns that industrial threats to relocate in areas where pollution controls were less restrictive would coerce states into adopting lax permit require-

> ments. The effluent limitation guidelines contained in section 304(b) [§ 1314(b)] and the corresponding effluent limitations to be promulgated under section 301(b) [§ 1311(c)] were intended to safeguard against industrial pressures by establishing a uniform 'minimal level of control imposed on all sources within a category or class.' Senator Muskie emphasized the function of the guidelines in promoting uniformity. He states that '[t]he Administrator is expected to be precise in his guidelines so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations.' "

The Court of Appeals for the District of Columbia reiterated this concept in *Natural Resources Defense Council, Inc.* v. *Costle,* 568 F.2d 1369, 1978 (D.C. Cir. 1977):

> "As noted in *NRDC* v. *Train,* the primary purpose of the effluent limitations and guidelines was to provide uniformity among the federal and state jurisdictions enforcing the NPDES program and prevent the 'Tragedy of the Commons'[13] that might result if jurisdictions can compete for industry and development by providing more liberal limitations than their neighboring states. 510 F.2d at 709."

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[13] The court explained this term in footnote 19 of its opinion, 568 F.2d at 1378:

> "The classic account of the Tragedy of the Commons can be found in Hardin, *The Tragedy of the Commons,* 162 Science 1243 (1968). Hardin makes the point in the context of sheepgrazing. Put simply, even over-simply, Hardin shows that if no one is authorized to set limits to preserve open pasture land as a whole, allowing sheep to graze on that land may lead to serious overgrazing, as each herdsman thinks only of his own advantage. The solution lies in some mandate, from above or by agreement, with sanctions to compel conformance."

The result is the same whether the disparity is achieved by adopting liberal limitations in one's own state or by seeking to impose unrealistically strict limitations on a neighboring state.

Even the trial court in the present case, *while enforcing different standards on different defendants depending on whether they settled or tried the case,* including providing that the requirements imposed on the settling defendants were made dependent on federal funding, purported to recognize the need for uniformity:

> "We cannot have one law for Milwaukee and another law for Waukegan, the North Shore Sanitary District, Gary and Muskegon. The law must be uniform, especially since we are dealing with the federal common law of nuisance, which the United States Supreme Court has said is peculiarly adaptable for use in the solution of interstate water problems." (Pet. App. F-21).

See also: *E. I. duPont de Nemours & Co.* v. *Train,* 430 U.S. 112, 138 (1977).

The uniformity envisioned by the Act is achieved through delegation of specific decision-making to an expert administrative agency. Decisions involving control of water pollution require unique expertise, scientific knowledge and resources. Many courts have acknowledged that the EPA has this "unique experience and expertise" E.g., *American Meat Institute* v. *EPA,* 526 F.2d 442, 450 n.16 (7th Cir. 1975). The trial court in the present case forthrightly acknowledged that it did not possess such experience and expertise, and noted the difficulty of making the required decisions without it:

> "The nature of the subject matter here, however, is such that my own experience and observation in

> life are relatively little use to me. It is well known to all of us that the arcane subject matter of some of the expert testimony in this case was sometimes over the heads of all of us to one height or another. I would be certainly less than candid if I did not acknowledge that my grasp of some of the testimony was less complete than I would like it to be, but short of enrolling in a university course directed toward a reorientation of my entire education and spending the years that that would involve, I know of no remedy for the problem." (Pet. App. F-3 and 4.)

Congress envisioned the difficulty that courts would experience if presented with the necessity of making specific decisions implementing national policy in an area of specialized scientific knowledge. Thus, the Senate Report comments on Sec. 505 of the 1972 Act (§ 1365) (authorizing citizens' suits) as follows: [14]

> "*Section 505 would not substitute a 'common law' or court developed definition of water quality.* An alleged violation of an effluent control limitation or standard, would not require reanalysis of technological in [sic] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision." *Legislative History* at 1497 (emphasis added).

As Milwaukee argued to the Court of Appeals, while the District Court knew "of no remedy for the problem" (of the courts', and particularly the District Court's, inadequate technical experience and knowl-

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[14] The Conference Committee, comprised of Senate and House members, adopted Section 505 of S.2770 with minor revisions not relevant here.

edge), Congress obviously did. As Milwaukee said below, the District Court failed to defer to the expert administrative agency in the type of situation where this Court has, and the District Court should have, applied the doctrine of primary jurisdiction:

> "[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. . . . Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.
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> It is significant that this mode of accommodating the complementary roles of courts and administrative agencies in the enforcement of law was originally applied in a situation where the face of the statute gave the Interstate Commerce Commission and the courts concurrent jurisdiction." *Far East Conference* v. *United States,* 342 U.S. 570, 574-575 (1952).
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> "In every case the question is whether the reasons for the existence of the [primary jurisdiction] doctrine are present and whether the purposes it services will be aided by its application in the particular litigation. These reasons and purposes have often been given expression by this court. In the earlier cases emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions. See *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S.

426, 51 L.Ed. 553, 27 S.Ct. 350, 9 Ann. Cas. 1075. More recently the expert and specialized knowledge of the agencies involved has been particularly stressed. See *Far East Conference* v. *United States,* 342 U.S. 570, 96 L.Ed. 576, 72 S.Ct. 492. The two factors are part of the same principle, 'now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.' *Id.* 342 U.S. at 574, 575." *United States* v. *Western R. R. Co.,* 352 U.S. 59, 64-65 (1956).[15]

(2) *Congress Gave Finality to the Administrative Uniformity It Chose.*

The second essential element of the 1972 Act, as stated by Senator Muskie, is "finality." Finality is achieved by the interaction of two concepts.

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[15] Note that here Illinois had the right to proceed administratively to seek the same relief it sought in court, a factor which the dissent thought important in *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, 309-319 1973), a case in which the doctrine of primary jurisdiction was applied by the Court even though such rights were arguably not present.

The first concept resulting in finality is that EPA action is final. EPA action becomes final and incontestable unless review is sought within 90 days in a Circuit Court of Appeals and, if reviewed, becomes final upon completion of review. Section 509(b)(2) (§ 1369(b)(2)) of FWPCA provides:

> "Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection [appeal to Circuit Court of Appeals within 90 days] shall not be subject to judicial review in any civil or criminal proceeding for enforcement."

The second concept to achieve finality is embodied in Sec. 402(k) (§ 1342(k)) which establishes that compliance with a permit shall be deemed compliance with the Act. Section 402(k) (§ 1342(k)) provides:

> "Compliance with a permit issued pursuant to this section shall be deemed compliance for purposes of sections 309 and 505 [§§ 1319, 1365], with sections 301, 302, 306, 307, and 403 [§§ 1311, 1312, 1316 and 1343], except any standard imposed under section 307 for a toxic pollutant injurious to human health. . . ."

In *E. I. duPont de Nemours & Co.* v. *Train,* 430 U.S. 112, 138 n.28, (1977), the Supreme Court said:

> "The purpose of [Sec.]402(k) [§ 1342(k)] seems to be to insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict. *In short,* [*Sec.*] *402(k) serves the purpose of giving permits finality.*" (emphasis added).

(3) *The Finality Enacted by Congress Is Essential to Timely Attainment of Pollution Control.*

These two concepts result in the "finality" sought by Congress. They provide the assurances that are necessary to cause dischargers to spend the billions of federal, local and private dollars required to control water pollution. Without such finality no discharger can be sure what the applicable standard will be. Only an administratively established standard can tell the discharger the precise level of control to be achieved. Practical and economic reality dictates that dischargers will not spend the substantial sums required until the precise levels that must be achieved are fixed and final. If a discharger remains subject to suit under the *Illinois* v. *Milwaukee* decision as applied by the District Court, all that is known is that the result is subject to "no fixed rules" and the "informed judgment of the chancellor," *Illinois* v. *Milwaukee, supra,* at 107-108 (Pet. App. I-16 and 17). This is hardly the stuff from which finality arises. See Zener, "The Federal Law of Water Pollution Control," *Federal Environmental Law,* 787-790 (E. Dolgin and T. Guilbert, ed. 1974) (chapter authored by Robert Zener, former General Counsel of the EPA).

(4) *The Administrative Uniformity Is Universally Enforceable by All Interested Parties at All Stages.*

Senator Muskie's characterization of the third essential element of the 1972 Act is "enforceability." A review of the statute quickly discloses that the enforcement provisions are not only pervasive, they are purposely designed to encourage the participation of all interested persons—governmental bodies and citizens alike—in the overall process, from establishment of

standards, to granting of permits, to assuring compliance.

The EPA's enforcement authority is set forth in Sec. 309 (§ 1319) of the Act and includes provisions for civil and criminal proceedings. Section 505 (§ 1365) provides for citizen suits, with the respective states acting on behalf of their citizens, and empowers state governors to enforce the Act. The states are also given express authority to challenge the action of the EPA in promulgating any effluent standards, limitations or regulations by appeal to the federal Courts of Appeals, Sec. 509 (§ 1369), and to participate in the permit proceedings, Sec. 402 (§ 1342). This participation includes the right to receive notice of the proceedings, the right to appear and be heard, the right to apply to the Administrator to exercise his discretion to veto the issuance of any permit, and finally the right to judicially challenge the issuance of any permit.

C. The Federal Statute Controls the Former Federal Common Law.

The Supreme Court has recognized that *federal legislation* on the subject of interstate waters *establishes the federal law in place of previously applicable federal common law* principles. *Arizona* v. *California,* 373 U.S. 546 (1963), cited by *Illinois* v. *Milwaukee, supra* at 106 (Pet. App. I-15). The *Arizona* case dealt with the allocation of water in the Colorado River between the various states that border that river. Congress had passed a statute providing a method and formula for the allocation of those waters. The State of California argued that apportionment of the water in the Colorado River should be controlled by the common law doctrine of equitable apportionment, which the Supreme Court had applied in earlier cases between vari-

ous States of the Union. The Supreme Court rejected the State of California's argument, noting that a federal statute was involved, and said:

> "It is true that the Court has used the doctrine of equitable apportionment to decide river controversies between states. But in those cases Congress had not made any statutory apportionment. In this case, we have decided that Congress has provided its own method for allocating among the lower Basin states the mainstream water to which they are entitled under the Compact. *Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress.*" 373 U.S. at 565 (emphasis added).

Once Congress acts to provide uniform federal rules and meaningful remedies, the manner in which the basic interests of the nation are to be attained is defined. The federal courts thereafter should be limited to carrying out the congressional mandate; if they retain any "common law" jurisdiction at all the exercise of that jurisdiction should be limited to the cost-effective control of point source discharges legislated by Congress, just as the common law jurisdiction in apportionment cases became jurisdiction to carry out the congressionally mandated apportionment. With the definitive legislative action of Congress, the sole branch of government in which all states are represented, the federal common law does not remain subject to "no fixed rules" and the "informed judgment of the chancellor," *Illinois* v. *Milwaukee, supra* at 107-108 (Pet. App. I-16 and 17). "Catch as catch can" rules established on a case-by-case basis by federal courts are no longer necessary or tolerable. The basic interests of

federalism demand that independent judicial approaches to a "federal common law" must give way.

D. The Control of FWPCA Has Been Recognized by Other Courts and Legal Scholars.

The rationale for the conclusion that the federal statute controls the federal common law is aptly stated as follows in Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy,* 86 Yale L.J. 1196, 1228-1230 (1977):

> "Congressional control of interstate spillovers is supported by a final consideration: the inherent power of Congress to take measures reasonably necessary for preserving the system of union. Spillovers have and will continue to create tensions among the states. As economic development proceeds and populations grow, interstate pollution will increase, and with it the potential for retaliatory tactics and litigation. Congressional power to mitigate these tensions through preventive legislation is implicit in the very decision to replace a loose confederation hamstrung by interstate friction with a strong national government.
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> * * *
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> Because of political and administrative constraints, Congress must often deal with spillover problems in a generic fashion. A case-by-case judicial determination of whether federal statutory impositions on states were warranted in particular instances would, in effect, make the judge-made common law of interstate pollution superior to congressional statute."

In Zener, "The Federal Law of Water Pollution Control," in *Federal Environmental Law, supra,* the

former General Counsel of the EPA states at page 790:

> "Finally, whatever limited importance the federal common law might have as a tool for the regulation of water pollution will tend to recede as the FWPCA Amendments of 1972 are implemented and detailed, numerical standards are established for the major categories of waste dischargers. In *Illinois* v. *Milwaukee,* the Court stated that '[w]hile the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning such rules of decision.' This formulation was obviously intended to give the Court some leeway in deciding whether to follow the rules contained in the FWPCA. However, since the decision, the 1972 Amendments have established a much more comprehensive regulatory scheme than had previously existed. If, under that scheme a discharger is governed by an administratively established effluent limitation embodied in a federal permit, it seems doubtful that a federal court would intervene under the auspices of federal common law to impose a different standard on the discharger." [16]

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[16] The author's footnote at this point states:

"Indeed, such intervention might be precluded by § 509(b)(2) of the FWPCA, 33 U.S.C. § 1369(b)(2) which provides:

> 'Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection [this includes the issuance of a discharge permit] shall not be subject to judicial review in any civil or criminal proceeding for enforcement.'

It should also be noted that § 401 of the FWPCA, 33 U.S.C.A. § 1341, establishes an administrative mechanism for resolution of interstate pollution disputes, under which a state may object to the issuance of a federal permit for a discharge in another state that affects the waters of the objecting state."

Similarly, Professor Grad in *Treatise on Environmental Law* (Matthew Bender, 1979), which followed the passage of the 1972 Act, makes the following statement regarding the status of the federal common law of nuisance in light of that statute:

> "The development of a federal common law of public nuisance—limited, hopefully, to actions between states—was probably a response to the inadequacies of past federal regulatory enactments in the air and water pollution control field. The law of nuisance has been far from clear in its application to modern water pollution and air pollution situations. It is in response to the inadequacies and lack of standards of the law of nuisance that much environmental regulatory legislation has been developed. The development of a federal common law of nuisance seems both unnecessary and unwarranted in the light of recent federal standards and federal enforcement sanctions provided under appropriate legislation. It may be useful to point out that the assertion of a federal law of nuisance in the *Illinois* v. *City of Milwaukee* case is clearly dictum. It is to be hoped that this peculiar and unnecessary departure from legislatively determined standards in the field will not see any further development. Indeed, perhaps the time has already come that federal regulations 'pre-empt the field of federal common law of nuisance,' as predicted by Mr. Justice Douglas." Grad, *supra* at § 3.03, Vol. I, p. 3-180.

As Milwaukee argued below, this is not a case involving the issue of federal preemption of state law. Here, we deal with "preemption" in the context of *federal statutory law* enacted by the national representative legislative body having acknowledged supremacy, *binding* the federal courts which apply *federal law*.

Thus, it is really a question of semantics whether one refers to the federal common law of nuisance being controlled by the statutory and regulatory body of law, or whether one states that the federal common law of nuisance has been "preempted" by federal legislation. Where one deals with a single sovereign, the federal governing entity, what is relevant is the completeness and controlling character of the statutory and regulaotry body of law.

By the passage of FWPCA, Congress has provided a statutory method for controlling water pollution which includes: (1) a comprehensive legislative framework establishing a uniform, nationwide system for the determination of effluent standards and limitations; (2) delegation of authority to establish the specific and detailed standards to an administrative agency having the knowledge, experience and resources to carry out the legislative objectives; and (3) creation of a system, in cooperation with the various states, to enforce the standards and limitations by means of a permit system, including an opportunity for all interested persons to participate in the establishment of the standards and limitations, followed by the granting of the permits and subsequent enforcement of restrictions imposed upon the permittees by the statute, the regulations and the permits themselves, with several points at which judicial review is available. In the face of this legislative scheme, the various federal courts should have no power to substitute for the federal law enacted by Congress their own respective notions of the federal law of interstate water pollution on an *ad hoc,* case-by-case basis.

This same rationale was expressed by the Court of Appeals for the Fourth Circuit in *Committee for the*

Consideration of the Jones Falls Sewage System v. *Train,* 539 F.2d 1006 (4th Cir. 1976). That court said:

> "To the extent there is a federal interest, it is expressed in the Federal Water Pollution Control Act Amendments of 1972, but the plaintiffs have no claim based upon the statute.
>
> *Indeed it would be an anomaly to hold that there was a body of federal common law which proscribes conduct which the 1972 Act of Congress legitimates.* The defendants are in compliance with the statute. They are operating under a permit issued in accordance with the statute and the authorization of the Environmental Protection Agency. The Congress and the Executive Department, acting through the Environmental Protection Agency, have declared their conduct lawful until the time for the application of more restrictive standards. While the state courts are free to apply state nuisance law more rigidly, a federal court in such a local controversy may not turn to a supposed body of federal common law to impose stricter standards than the statute provides." 539 F.2d at 1009 (emphasis added).

This same analysis was adopted in *New England Legal Foundation* v. *Costle,* 475 F.Supp. 425 (D.C. Conn. 1979). There Circuit Judge Newman, United States Court of Appeals for the Second Circuit, sitting by designation, dismissed a claim alleging a federal common law nuisance for failure to state a claim upon which relief can be granted. The claim alleged that the defendant maintained a federal common law nuisance by burning oil containing sulfur in excess of limitations established for sulfur content under the federal Clean Air Act and by the State of Connecticut. The court noted, however, that the defendant's action was au-

thorized by a variance approved in accordance with the federal statute. The court held:

> "This Court will not devise an equitable remedy to proscribe the very conduct that the EPA, acting in its regulatory capacity pursuant to statutory mandate, has specifically legitimated. While it is conceivable that the Connecticut state courts may apply state nuisance law more rigidly, this Court will not 'turn to a supposed body of federal common law to impose stricter standards than the statute provides.' *Committee for Jones Falls Sewage System* v. *Train,* 539 F.2d 1006, 1009 (4th Cir. 1976)." 475 F.Supp. at 441-442.

The court reasoned that since the purpose of the equitable relief sought under the federal common law was to vitiate the effect of the EPA's determination to permit the activity which created the alleged nuisance, and since the federal Clean Air Act provided a specific statutory remedy to challenge this action of the EPA, the court would not create a common law remedy to accomplish what a successful proceeding under the statute would achieve. The court said:

> "The relief sought by plaintiffs' action would have a substantial impact upon the implementation of a specific agency determination. Plaintiffs' claim against LILCO's conduct as a federal common law nuisance is, in effect, an attack upon the validity of the EPA-approved variance. It is mere sophistry to argue that a challenge to LILCO's operation in compliance with the special limitation is not a challenge to the legality of the limitation itself. . . .
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> * * *
>
> Since the ultimate purpose of any equitable relief against LILCO is to vitiate the effect of the special limitation, this Court will not create a common law remedy to accomplish that which a suc-

cessful § 7426 petition would achieve." 475 F.Supp. at 441 n.21.[17]

This same reasoning is applicable in this case. The remedy imposed by the courts below vitiates the permits issued to Milwaukee under FWPCA. Since FWPCA provides specific remedies to the complaining states which, if successful, could achieve the desired result, the federal courts should not provide federal common law injunctive remedies when adequate federal statutory remedies are available.[18]

The operative language of FWPCA supports this position. To cause the expeditious and efficient expenditure of the billions of federal, state, local and private dollars required to abate water pollution, dischargers must be assured as to what the applicable standards are. Practical and economic reality dictates that dischargers required to expend huge sums of public funds know that the applicable standards are fixed and final. See discussion *supra* at 43-45.

If a discharger remains subject to suit under the "federal common law" as applied by the courts below, and subject to an *ad hoc* remedy determination by a federal court without respect to the standards under the federal statutory law, it would ill behoove any municipality or other governmental agency to move forward in an expeditious manner. Rather, it would place

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[17] On May 20, 1980, in an as yet unpublished opinion, the U.S. Court of Appeals for the Second Circuit decided the appeal in *New England Legal Foundation* v. *Costle, supra*. With respect to the trial court's dismissal of the federal common law claim against LILCO, the Court of Appeals reversed decision pending this Court's determination of this case, retaining jurisdiction to deal with this issue on the basis of supplemental briefs if necessary.

[18] *See, e.g., Reisman* v. *Caplin*, 375 U.S. 440 (1964).

a premium on delay, so as to permit all forums having possible jurisdiction to speak and thus prevent false starts in these monumentally expensive public projects with attendant waste of public funds.

E. Congress Provided That Compliance With Permits Issued Under the Congressionally Established Administrative Procedures Is Compliance With Federal Law.

Section 505 (§ 1365) is the provision of the Act providing for citizen suits. Subsection (e) thereof states:

> "(e) nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or seek any other relief (including relief agaist the Administrator of a State agency)."

Since compliance with a permit is specifically defined by Sec. 402(k) (§ 1342(k)) as compliance with Sec. 505 (§ 1365), and since common law actions are provided for in Sec. 505, it follows that the standards and limitations under Secs. 301, 302, 306, 307, and 403 (§§ 1311, 1312, 1316, 1317 and 1343) are the discharge limitations to which a discharger may be held under common law or in the federal statutory scheme.[19] Thus, the language of the 1972 Act requires the conclusion

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[19] Section 301 (§ 1311) sets forth certain effluent limitations and gives the Administrator of the EPA authority to define additional effluent limitations. Section 302 (§ 1312) authorizes the Administrator to establish stricter limitations than are found in Section 301. Section 306 (§ 1316) authorizes the Administrator to set national standards of performance. Section 307 (§ 1317) authorizes the Administrator to establish toxic and pretreatment effluent standards. Section 403 (§ 1343) concerns ocean discharge criteria.

that the federal common law of interstate water pollution is governed by permit limitations in those instances in which the harm complained of is the subject of a permit issued pursuant to the Act.

F. The Decisions Below Are an Attempt to Raise Federal Common Law Above the Paramount Federal Statutes.

In the face of the congressional enactments, the decisions below are a judicial foray into the political field of resource allocation in environmental management of the nation's interstate water resources requiring expenditures of municipal, state and federal funds of staggering magnitude. One of the basic characteristics of the congressional mandate in FWPCA is that costs and the availability of federal funds to localities and states providing interstate water protection are important factors in pollution control determinations. Nevertheless, costs and the availability of federal funds were not only ignored below, they were expressly declared by the District Court to be of no interest to the decisional rationale.

The decisions below considered federal legislation as a parallel course for dealing with water pollution which was of passing, but not controlling, interest to the totally independent approach by the courts under the federal common law. This approach failed to accord any weight to the congressional provision for participation of affected municipalities and states in an expert administrative forum, while expressing the trier of fact's own lack of expertise in the area. In this setting, both the District Court and the Court of Appeals held the "federal common law" to be wholly distinct from, and independent of, the federal statutory scheme

for controlling the identical subject matter, namely point source discharges to the nation's waters.[20]

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[20] Various lower federal courts have considered the effect of the enactment of the 1972 Act and the 1977 Act on this Court's opinion in *Illinois* v. *Milwaukee, supra* at 107 (Pet. App. I-16). In certain instances the courts have found it unnecessary to deal with the issue: *Reserve Mining Co.* v. *Environmental Protection Agency,* 514 F.2d 492, 532 (8th Cir. 1975) ["[W]e deem it unnecessary and, indeed, unwise to also rely on federal nuisance law."]; *Township of Long Beach* v. *City of New York,* 445 F.Supp. 1203, 1215 (D.N.J. 1978), ["I will therefore deny the motion to dismiss based on preemption without prejudice to a renewal thereof after further clarification of the nature of this suit, the new regulations and their effect on the preemption issue"]; *Stream Pollution Control Bd.* v. *United States Steel Corp.,* 512 F.2d 1036 (7th Cir. 1975) [unnecessary to decide]. In other instances the courts have concluded that the Acts control, at least with respect to federal common law nuisance claims challenging activities expressly permitted by the federal statutory scheme: *Committee for the Consideration of the Jones Falls Sewage System* v. *Train,* 539 F.2d 1006, 1009 (4th Cir. 1976) ["[I]t would be an anomaly to hold that there was a body of federal common law which proscribes conduct which the 1972 Act of Congress legitimates"]; *cf., New England Legal Foundation* v. *Costle,* 475 F.Supp. 425, 441-442 (D.C. Conn. 1979) *aff'd* in part, held in abeyance in part, —— F.2d —— (2d Cir. May 20, 1980) [in context of Clean Air Act, 42 U.S.C. § 7401 *et seq.,* court may not "turn to a supposed body of federal common law to impose stricter standards than the statute provides," relying on *Committee for the Consideration of the Jones Falls Sewage System, supra*]. Other cases preceeded promulgation of the EPA's regulations under the 1972 Act: *United States* v. *United States Steel Corp.,* 356 F.Supp. 556 (N.D. Ill. 1973) ["At least until the Environmental Protection Agency has acted effectively, the hands of the plaintiff governments are not tied."]; *United States* v. *Ira S. Bushey & Sons, Inc.,* 363 F.Supp. 110, 119-120 (D. Vt. 1973), aff'd. mem. 487 F.2d 1393 (2d Cir. 1973), cert. denied, 417 U.S. 976 (1973) [prior to regulations]; *Illinois* v. *Milwaukee,* 366 F.Supp. 298, 299-300 (N.D. Ill. 1973) [prior to regulations]. Still other cases have determined to various degrees that the 1972 and 1977 Acts and federal regulations do not affect the federal common law of nuisance: *California Tahoe Regional Planning Agency* v. *Jennings,* 594 F.2d 181, 193 (9th Cir. 1979),

G. The Courts Below Ignored the National Character and Massive Fiscal Impact of the Problem Considered.

The courts below failed to recognize and deal with the pervasive character of the problem. The issues involved in this case are not merely directed to the resolution of an isolated situation in Milwaukee. They present a problem to this nation as a whole, a subject most recently addressed in a GAO report, *Report by the Comptroller General of the United States: Large Construction Projects to Correct Combined Sewer Overflows Are Too Costly,* CED-80-40 (December 28, 1979). There are approximately 1,300 communities in the United States, including most of the major cities, which have a total combined sewer area of 2¼ million acres, and serve a total of 38 million persons. In fact, 58 major cities such as Chicago, Detroit, New York, Cleveland, Pittsburgh, Philadelphia, San Francisco and Washington, D.C., located in 24 states, have eighty-three percent of the combined sewer area and eighty-one percent of that resident population. EPA, *Report to Congress on Control of Combined Sewer Overflow in the United States,* MCD Rpt. No. 50 (EPA's report pursuant to Sec. 516(c) of FWPCA, Oct. 1, 1978).

With respect to funding combined sewer overflow projects, after estimating national costs at $21.16 billion (1978 dollars) for *controlling* combined sewer overflows so as to permit two untreated overflow events

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cert. denied, —— U.S. —— (No. 79-15, Oct. 1, 1979) [dismissed for failure to state a claim, but stated federal common law claim not affected]; *United States* v. *Stocco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975) [dicta, no preemption]; *National Sea Clammers Assoc.* v. *City of New York,* —— F.2d ——, slip opinion at Part IV, (3d Cir. Feb. 5, 1980) [no effect, relying on Court of Appeals decision in *Illinois* v. *Milwaukee, supra*].

per year rather than totally eliminating them,[21] the EPA's October 1, 1978 report to Congress states:

> "It must be remembered that any increase in spending for combined sewer overflow control needs . . . will result in a decrease in spending for all other pollution control needs . . . These trade offs must be weighted carefully for any given municipality." EPA, Report to *Congress on Control of Combined Sewer Overflow in the United States, supra* at ES-9-10.

Illustrative of the technical considerations and their impact on costs to the public is a passage from EPA, *Nationwide Evaluation of Combined Sewer Overflows and Urban Storm Water Discharges.* EPA-600/2-77-064a (Sept., 1977) at 3:

> "Analysis indicated that control of [overflows from combined sewer at the level of] the one hour, one month storm would permit capture of 90 percent of the precipitation volume. Sizing for the two year, one hour storm yields relatively little incremental control and requires a much higher [cost and] control volume."

A more specific example of the fiscal impact of dealing with combined sewer overflows and one which has direct application to this litigation is provided by a recent GAO report, *Report by the Comptroller General of the United States: Combined Sewer Flooding and Pollution—a National Problem. The Search for Solutions in Chicago,* CED-79-77 (May 15, 1979). The report considered whether a Tunnel and Reservoir Plan

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[21] *See, EPA, 1978 Needs Survey: Cost Methodology for Control of Combined Sewer Overflows and Stormwater Discharge,* EPA Rpt. No. 43019-79-003 (EPA's report to Congress pursuant to Sec. 516(b) of FWPCA, Feb. 10, 1979).

("TARP") is a cost-effective solution to Chicago's combined sewer overflows. The TARP plan is similar to the "convey, store and treat" solution ordered by the court below to solve the combined sewer overflow problems in the Milwaukee area except, as noted in the report, TARP is not intended to *eliminate* overflows; it is merely meant to *control* them. *Id.* at Vol. 1, pp. 4-5.

According to the GAO, TARP is "one of the largest" public works projects in the nation.

> "[I]ts projected costs will probably exceed the $9.2 billion expended for the Alaskan pipeline." GAO, *Report by the Comptroller General of the United States, supra* at Vol. 1, p. 1.
>
> * * *
>
> "Determining the precise cost for TARP and the associated projects is difficult. However, it will be expensive—$4 billion to $8 billion (December 1977 estimates) depending on what estimates are used and which associated projects are included in the total. If history is any indication, costs will continue to escalate and could exceed $11 billion by 1983." *Id.* at Vol. 1, p. 4.

In summary, the GAO report says that when TARP is judged by what it will cost, the taxpayers "must stop and think."

> "In February 1979, EPA estimated that it would take more than $25 billion just to solve the pollution problems of combined sewer communities. If the cost of solving flooding problems associated with combined sewers is included, it could ultimately run more than $100 billion. Thus, the time may have come to reexamine the project." *Id.* at Vol. 1, pp. 34-37.

It is in this setting, where the technical problems are only beginning to be known, where means to control the problem have monumental fiscal implications, and where major segments of the country and vast numbers of its population are affected, that the courts below have acted. With respect to the evidence relating to Milwaukee's plans to control combined sewer overflow on cost-effective bases consistent with federal statutory and administrative regulations (P.Ex. 23-30, Tr. 124, 388, 395, 396), the District Court said:

> " I read much of the material in the Combined Sewer Overflow study [of Milwaukee] and I find in it no express commitment to the elimination of the overflows. What I find is reference to 'control' of the overflows and 'reduction' of overflows. It is not altogether clear to me that the Combined Sewer study starts with the proposition that the overflows must be eliminated.
>
> I can save a lot of time, and I am going to save a lot of time in the event any further study of that issue is contemplated, because it will be and it is the ruling of this court that all overflows shall be eliminated." Pet. App. F-25.

With respect to costs, the District Court blandly stated:

> "This brings us to the matter of cost, as to which there has been considerable controversy in this case. I think we should break it down into two things, because it is easy to get carried away by the huge numbers that have been bruited about. In my view, the cost of eliminating the overflows is not really a factor here." Pet. App. F-28.

Thus, the District Court ordered the total elimination of overflows, ordered that the cost of accomplish-

ing this objective was not a factor, and ordered the parties to submit timetables to carry out the remedy so imposed on Milwaukee. The Court of Appeals affirmed, but with the comment that:

> "[T]he defendants do not provide us with evidence sufficient to justify disagreement with what the court found necessary or evidence sufficient to show that the marginal increase in cost of building a facility of the size required by the district court is significantly greater than the cost of building a facility of the size presumably contemplated by defendants." 599 F.2d at 173 (Pet. App. A-39).

Milwaukee is faced with compliance with a costly judgment of the District Court which determined costs were not a factor; a judgment affirmed by a Court of Appeals on the basis of Milwaukee's failure to provide it with the very same evidence which the District Court gave Milwaukee no opportunity to present! That evidence has now been refined, and shows costs of approximately $300,000,000 to comply with the requirement of eliminating sewer overflows, over and above amounts required under the congressional permit system for CSO control.[22]

When one considers that the numbers involved in this case amount to literally hundreds of millions of dollars for Milwaukee alone, and to tens of billions of dollars for the nation as a whole, the conduct of the trial court in denying the relevancy of costs and cost effectiveness, and preventing full proof thereof, fol-

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[22] In accordance with paragraph 8 of the District Court's Judgment Order, defendants have made extensive engineering studies (including Pilot Plant operations) which have refined these costs (Pet. App. D-8). The studies have all been monitored by Illinois engineers at Milwaukee's cost in accordance with paragraph 4 of the Judgment Order (Pet. App. D-6).

lowed by an appellate decision predicated on a lack of evidence of costs, cannot be permitted to stand.

The *ad hoc* approach of the courts below, unless reversed, will establish a precedent creating untold harm to the uniform, fiscally responsible approach adopted by Congress in FWPCA and administered by the EPA. In mandating the total elimination of all overflows without respect to cost, the availability of federal funds, or the availability of practicable measures to control sewer overflows, the courts below have subjected the rights of individual citizens, municipalities and states throughout the United States to a precedent having impact upon the entire nation's water resources and having fiscal impacts reaching magnitudes important even to the total federal budget, let alone the budgets of affected municipalities and states.

H. Congress Recognized and Dealt With Fiscal Impacts.

In enacting FWPCA, Congress recognized that while substantial local and state funds would be required to alleviate detrimental discharges to the nation's waters, imposing the full burden of such an undertaking on individual municipalities would lead to fiscal disaster. Thus, the congressional enactments clearly contemplate federal subsidization to a very substantial percentage of the total cost, usually 75%, and further provide for delays in capital expenditures in the event federal funds are not available. In fact, Congress specifically amended FWPCA in 1977 to provide for extensions of time where the municipalities' failures to provide the mandated controls were caused by the unavailability of federal funds (Sec. 301(i) (§ 1311(i) of FWPCA).

With the huge dollar amounts involved in wastewater treatment, no lengthy analysis is needed to demonstrate that if abatement requirements are imposed on individual municipalities without consideration of financial resources, including the availability of federal funds, and of the relative benefits achieved by the requirements of enormous expenditures local fiscal disasters are not only possible but inevitable. Congress clearly recognized this basic consideration.

In contrast, the District Court said:

> "The terms of this order are binding upon the defendants whether or not federal financial assistance becomes available. I hope that federal assistance is made available but if it is not, the program decreed by this order must proceed nonetheless." Pet. App. F-28.

> "But I want to disabuse you right now, Mr. Moerke, and thereby save you some time—that is why I am saying it now. There is no point in your preparing a lot of testimony on alternate theories —if you don't get federal money, it is going to take you this much longer, and preparing experts to say how much longer—because as I said earlier, on the 29th of July, this order will not be contingent upon your getting federal funding. Milwaukee sewage is not a federal problem." Transcript of September 9, 1977 hearing before the District Court at 42.

Contrast the Congressional statement of policy in the Act:

> "[I]t is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works. . . ." Sec. 101(a)(4) (§ 1251(a)(4)).

Congress has balanced political considerations in providing that federal funding is a significant factor to be considered in the timing and implementation of wastewater treatment programs and the control of overflows, recognizing that political and fiscal realities are necessarily encountered in dealing with problems connected with the nation's waters. This is directly contrary to the position exemplified by the Court of Appeals comment that "no one even attempts to justify such [overflow] discharges as harmless or insignificant." The justification is in a political balance of fiscal resource allocation. Both of the courts below explicitly refused even to consider fiscal impacts or cost-effectiveness. After stating its conclusion that cost and the availability of federal funds are irrelevant, the District Court required that the "program decreed by this order must proceed nonetheless . . . Milwaukee sewage is not a federal problem." (Pet. App. F-28 and transcript of September 9, 1977 hearing before the District Court at 42). The courts and Congress could not be further apart.

I. Congress and This Court Require a Balancing of Equities, But the Courts Below Failed and Refused to Do So.

The congressional approach is termed the "cost-effective" approach by engineers; it equates in large part to the doctrine of balancing the equities found in the courts. As shown above, the courts here have refused to even permit cost evidence on which to consider an equitable balance. In *Eccles* v. *Peoples Bank*, 333 U.S. 426 (1948), where a declaratory judgment was sought, this Court broadly stated:

> "It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff

> and the consequences of giving the desired relief. Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative." 333 U.S. at 431.

See generally, Annot., 40 A.L.R. 3rd 601 (1971).

With respect to health, the District Court found that fecal coliform counts on Illinois' Lake Michigan beaches failed to demonstrate any pollution coming from Milwaukee, and that there is no evidence of any outbreak of water-related diseases in Illinois. With respect to eutrophication, the District Court found that it is impossible to measure accurately any effect on the lake caused by Milwaukee's discharges, or to measure accurately the diminution in the amount of nutrients in the lake if such discharges were altogether discontinued. Then it proceeded to formulate a remedy for a speculated nuisance rather than one established in the record, and refused to permit evidence necessary to a balancing of the equities and hardships in formulating the remedy.

The District Court precluded evidence dealing with practicable means of *controlling* sewer overflows, short of complete *elimination,* and evidence dealing with the monumental costs of, and the lack of cost-effectiveness of, complete elimination of sewer overflows (Pet. App. F-25). The District Court consequently eliminated any possibility of balancing the equities and hardships in formulating the terms of the mandatory injunction it granted. Thus, the District court failed to exercise informed judgment as required by this Court. *Illinois* v. *Milwaukee, supra,* at 108-109 (Pet. App. I-17 and 18). In affirming the District Court's order to eliminate

all sewer overflows, the Seventh Circuit relied upon the very evidence which the District Court precluded. 599 F.2d at 173 (Pet. App. A-39).

Regarding the balancing requirement in the context of what injunctive relief should be granted, D. Dobbs, *Remedies* (1973) states at 54-55:

> "The second stage of remedial analysis is the shaping of the remedy. Where the plaintiff . . . is to recover an injunction, it is the problem of formulating appropriate terms. For instance, in a simple nuisance case, the plaintiff may complain of a factory's loud operation down the block from his residence. If the court decides that this is indeed a nuisance, and balances equities and hardships in favor of the plaintiff, there is the task of providing specific commands in the injunction. And this, too, requires some balancing."

Harrison v. *Indiana Auto Shredders Co.*, 528 F.2d 1107 (7th Cir. 1976), the decision relied upon the Seventh Circuit for the proposition that an injunction is appropriate when an imminent danger to health is involved, 599 F.2d at 166 (Pet. App. A-24), recognized the necessity of balancing equities and hardships in a reasonable fashion:

> "Of course, where the pollution from a mill or factory creates hazards that imminently and dangerously affect the public health, the appropriate relief is a permanent injunction against the continuation of the polluting activities. It would be unreasonable to allow a private interest in the profits and products of a polluting menace to outweigh the community's interest in the health of its citizens. However, a permanent injunction that shuts down a mill or factory without consideration of the extent of the harm that its pollution caused would be equally unreasonable . . . [R]easonable-

> ness is the standard by which the court should fashion its relief in ordinary nuisance cases, [cite deleted], and reasonableness is also the appropriate standard for relief from environmental nuisance." 528 F.2d at 1122-1123.

In *Cappaert* v. *U.S.*, 426 U.S. 128 (1976), this Court applauded the appropriate balancing of equities and hardships by the District Court in formulating injunctive relief. That case involved the request for injunctive relief to prevent the drawdown of ground water which would extinguish a unique species of subterranean fish. The court stated:

> ". . . [A]s the District Court has correctly determined, the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool as the natural habitat of the species sought to be preserved. *The District Court thus tailored its injunction, very appropriately, to minimal need,* curtailing pumping only to the extent necessary to preserve an adequate water level in Devil's Hole, thus implementing the stated objectives of the Proclamation." 426 U.S. 141 (emphasis added).

Unlike the court in the *Cappaert* case, the District Court herein did not limit its injunction to minimal need. The District Court acted unreasonably in precluding evidence on remedial steps less stringent than total elimination of overflows (which would eliminate the vast majority of the pollution), and in refusing evidence of the costs and the lack of cost-effectiveness of such complete elimination, particularly in light of (a) the total absence of any empirical showing of harm, (b) the direct disagreement among the experts as to the theoretical possibilities of harm, and (c) the compliance of Milwaukee with discharge permits

granted pursuant to the comprehensive federal water pollution laws and regulations discussed above.

II. THE DECISIONS BELOW IGNORED PREVIOUS DECISIONS OF THIS COURT WHICH ARE CONTROLLING PRECEDENT AND WHICH ESTABLISH THAT, IN THE ABSENCE OF EMPIRICAL EVIDENCE OF ANY NUISANCE, THE CONFLICTING TESTIMONY OF EXPERT WITNESSES IS NOT SUFFICIENT TO ACCORD RELIEF IN AN ACTION ALLEGING AN INTERSTATE NUISANCE.

A. The Record Is Devoid of Any Empirical Evidence of Nuisance in Illinois or Michigan Waters. The Courts Below Could Rely Only on the Speculations of Experts Which Were Contradicted by Historical Fact.

A fundamental, basic and controlling fact of this case is that no witness and no exhibit in the entire record found any virus or other pathogen from any source in any Illinois or Michigan waters. Instead, the evidence presented by the plaintiffs consisted of inconclusive "fecal coliform counts" and the conclusions and opinions of experts, all of whom the District Court noted were interested in the outcome of the case, and none of whom were neutral as between the parties or as to the outcome of the case (Pet. App. F-4). Specifically, the District Court made the following findings *after first acknowledging* (1) that the expert testimony was sometimes over the head of the court, that the court's grasp of some of the testimony was less complete than the court would have liked it to be, and (2) that the court would have had to enroll in a university course directed at a reorientation of its entire education to remedy this deficiency (Pet. App. F-3 and 4):

1. If the position of the State of Illinois is correct, a properly conducted study should have resulted

in some circumstantial evidence that would tend to confirm Illinois' theory. The State of Illinois could have performed studies to determine whether Milwaukee sewage effluents are not sufficiently diluted in and by Lake Michigan so that only insignificant numbers of pathogens and other pollutants, if any, could reach Illinois waters. Illinois elected not to do so because it was afraid of a negative result and in so electing chose to produce less evidence than it should have (Pet. App. F-10).

2. There are fecal coliform counts on Illinois beaches which fail to demonstrate any pollution coming from Milwaukee (Pet. App. F-11).

3. There is no evidence of any outbreak of water-related diseases in Illinois (Pet. App. F-12).

4. There is no evidence of any present effect of Milwaukee discharges or, for that matter, of the effect of any other nutrient discharges, on fish life in the lake (Pet. App. F-18).

5. There is no evidence that any specific algal problem or any specific taste and odor problem experienced by residents of Illinois or Michigan is attributable to Milwaukee sewage as opposed to the nutrients discharged by any other point or non-point source. (*Id.*)

6. It is impossible to measure accurately any effect on the lake caused by Milwaukee's discharges or to measure accurately the diminution in the amount of nutrients in the lake if Milwaukee discharges were altogether discontinued (Pet. App. F-19).

Thus, the fact is that there has been no showing of any disease or any other adverse effect resulting in Illinois or Michigan waters from sewage discharges in Wisconsin during the century or more that Milwaukee

has been discharging to Lake Michigan. Indeed, no outbreak of disease has been shown to have occurred in Milwaukee itself, though Milwaukee's drinking water intakes are close to the points of discharge while those of Illinois and Michigan are, to say the least, remote. Note that the concern expressed by the courts below related to enteroviral diseases, and such diseases manifest themselves in a matter of weeks after exposure (Tr. 2139, 2198). Certainly if there were any merit to the speculated hazard, there would be *some* evidence of its existence, some evidence that it actually caused *something* in the lengthy span of time during which the supposed hazard has existed. There is nothing!

This Court's 1972 decision in *Illinois* v. *Milwaukee* relied upon previous decisions of this Court as having established a "federal common law" relating to interstate nuisance controversies. These cases are *Missouri* v. *Illinois,* 180 U.S. 208, 200 U.S. 496 (1901, 1906), *New York* v. *New Jersey,* 256 U.S. 296 (1921) and *North Dakota* v. *Minnesota,* 263 U.S. 365 (1923).

The status of the evidence in this case as summarized in the findings of the District Court set out above is strikingly similar to the evidence before this Court in *Missouri* v. *Illinois, supra.* This Court rendered two decisions in the *Missouri* v. *Illinois* case. The first decision, reported at 180 U.S. 208, dealt with procedural matters at the demurrer stage of the proceedings.

When the *Missouri* case came before the Supreme Court on the merits, Justice Holmes had this to say about the earlier decision (the only one cited by the District Court in this case):

> "The decision upon the demurrer discussed mainly the jurisdiction of the court, and, as leave to answer

was given when the demurrer was overruled, naturally there was no very precise consideration of the principles of law to be applied if the plaintiff should prove its case. That was left to the future, with the general intimation that the nuisance must be made out upon determinate and satisfactory evidence, that it must not be doubtful, and that the danger must be shown to be real and immediate.

* * *

But the evidence now is in, the actual facts have required for their establishment the most ingenious experiments, and for their interpretation the most subtle speculations, of modern science, and therefore it becomes necessary at the present stage to consider somewhat more nicely than heretofore how the evidence in it is to be approached." 200 U.S. at 517-518.

Justice Holmes proceeded to emphasize two major legal principles: (1) Congress has the power to enact the paramount law, and (2) the courts should not take the place of the legislature.

"In the case at bar, whether Congress could act or not, there is no suggestion that it has forbidden the action of Illinois. The only ground on which that state's conduct can be called in question is one which must be implied from the words of the Constitution. The Constitution extends the judicial power of the United States to controversies between two or more states, and between a state and citizens of another state, and gives this court original jurisdiction in cases in which a state shall be a party. Therefore, if one state raises a controversy with another, this court must determine whether there is any principle of law, and, if any, what, on which the plaintiff can recover. But the fact *that this court must decide does not mean, of course, that it takes the place of a legislature* . . .

> If we suppose a case which did not fall within the power of Congress to regulate, the result of a declaration of rights by this court would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the States, sanctioned by the legislature of the United States.
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> * * *
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> The difficulties in the way of establishing such a system of law might not be insuperable, but they would be great and new." 200 U.S. at 518-520 (emphasis added).

The Supreme Court then stated that these legal principles affect the manner in which a court must view the evidence.

> "It is decided that a case as is made by the bill may be a ground for relief. The purpose of the foregoing observations is not to lay a foundation for departing from that decision, *but simply to illustrate the great and serious caution with which it is necessary to approach the question whether a case is proved.*" 200 U.S. at 520 (emphasis added).

The Supreme Court then turned to the evidence. It is strikingly similar to—though much stronger than—the evidence before the courts below:

> "*The plaintiff's case depends upon an inference of the unseen.* It draws the inference from two propositions. First, that typhoid fever has increased considerably since the change, and that other explanations have been disproved; [No enteroviral outbreaks were shown in the *Milwaukee* case now before the Court] and second, that the bacillus of typhoid can and does survive the journey and reach the intake of St. Louis in the Mississippi.

We assume the now-prevailing scientific explanation of typhoid fever to be correct. But when we go beyond that assumption, eveything is involved in doubt. The data upon which an increase in the deaths from typhoid fever in St. Louis is alleged are disputed. The elimination of other causes is denied. The experts differ as to the time and distance within which a stream would purify itself. No case of an epidemic caused by infection at so remote a source is brought forward and the cases which are produced are controverted.

The Chicago drainage canal was opened on January 17, 1900. The deaths from typhoid fever in St. Louis, before and after that date, are stated somewhat differently in different places . . . we assume that the increase is real. Nevertheless, comparing the last four years with the earlier ones, it is obvious that the ground for a specific inference is very narrow, if we stopped at this point. The plaintiff argues that the increase must be due to Chicago, since there is nothing corresponding to it in the watersheds of the Missouri or Mississippi. On the other hand, the defendant points out that there has been no such enhanced rate of typhoid on the banks of the Illinois as would have been found if the opening of the drainage canal were the true cause. [in the instant case there is no empirical evidence of disease or pathogen presence]

* * *

Both sides agree that the detection of the typhoid bacillus in the water is not to be expected [In the *Milwaukee* case, the trial court found that plaintiff had chosen not to perform available detection studies, thus producing less evidence than it should have because fearful of the result!]. But the plaintiff relies upon proof that such bacilli are discharged into the Chicago sewage in considerable quantities; that the number of bacilli in the water of the Illinois is much increased, including the

> *bacillus coli communis,* which is admitted to be an index of contamination, and that the chemical analyses lead to the same inference.
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> * * *
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> On the other hand, the defendant's evidence shows a reduction in the chemical and bacterial accompaniments of pollution in a given quantity of water, which would be natural in view of the mixture of nine parts to one from Lake Michigan. It affirms that the Illinois is better or no worse at its mouth than it was before, and makes it at least uncertain how much of the present pollution is due to Chicago and how much to sources further down, not complained of in the bill. It contends that if any bacilli should get through, they would be scattered and enfeebled and would do no harm." 200 U.S. at 517-527 (emphasis added).

While the evidence before the Court in *Missouri* v. *Illinois* was strikingly similar to and considerably stronger than that present here (in the absence of tests that could and should have been performed by plaintiff), the result reached by the Supreme Court is the opposite of that reached by the courts below—the Supreme Court dismissed the case!

Similarly, the Supreme Court in *New York* v. *New Jersey, supra,* met the same evidentiary problem and held that in such a situation history prevails over the speculation of experts.

> "[T]he evidence of the complaint is that, as early as 1906, the water adjacent to New York City . . . was much polluted by sewage, but that the water in other parts of the bay, especially near Robbins reef light, was somewhat, but not greatly, contaminated . . . And the evidence taken under the order of the court in 1919 shows an irreconcilable conflict in the testimony as to the then condition of

> the water, especially near Robbins reef light. [I]t is undisputed that . . . New York sewage, untreated, was discharged from over 450 sewers directly into the adjacent waters . . . .
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> * * *
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> It would seem, therefore, that if the anticipations of the experts for the complainants, as to the results likely to be produced by the effluent from the sewer of defendants, were well founded, by the year 1919 [in the case of Milwaukee, 1972] conditions in the harbor should have become so pronounced and plain [in the case of Milwaukee the epidemics of enteroviral disease would have been so rampant] that there could not have been such conflict as the record shows in the testimony of trustworthy and competent scientists as to its then existing condition.
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> * * *
>
> [W]e must conclude that the complainants have failed to show by the convincing evidence which the law requires that the sewage which the defendants intend to discharge into Upper New York Bay . . . would so corrupt the water of the Bay as to create a public nuisance . . . ." 256 U.S. at 311-314.

Contrary to the action of the courts here, which found liability and imposed severe and costly remedies on the defendants, the Supreme Court there, in extremely similar fact circumstances, dismissed the action. That same result is compelled here where there is *no* empirical evidence of *any* effect from more than a hundred years of Milwaukee's discharges to Lake Michigan, and where the experts were in direct disagreement as to the theoretical possibilities of effect.

This is particularly true in light of the fact that Milwaukee's discharges to Lake Michigan have been and continue to be the subject of a statutory scheme

administered by an independent federal agency interested only in the public health and public navigable waters, and which agency is unbiased as between contesting parties.

Of more than passing interest is the fact that Illinois and Michigan chose not to participate in the administrative proceedings relating to Milwaukee's permits although, under the federal statute, they had notice and a full opportunity to do so. Section 302(a) (§ 1312 (a)); § 509(b) (§ 1369(b)); § 402(b)(5), (§ 1342(b) (5)); Wis. Stat. § 147.20 (1977). Those states and states relying on this case for precedent should not be permitted to take weak cases to non-expert federal court forums for a trial on expert opinion to avoid the application of independent, neutral expertise under the congressionally enacted permit system.

An analysis of respondents' proof below leads to reversal. The analysis starts with the legal truism that in order for respondents to prevail they must have introduced some evidence of the actual state of Lake Michigan water within the jurisdiction of each of the respondents. Lake Michigan is out there; its waters are available for scientific analysis. Testing procedures to prove the existence of the dangers speculated upon by the witnesses are known and available. Yet respondents chose to do no such testing—a choice which the District Court characterized as having been made out of fear over the results (Pet. App. F-10). Are there viruses in Illinois' waters? Are there pathogenic bacteria in Illinois' waters? The best that can be said for the record before this Court is that no one really knows and that the respondents did not attempt to prove what was there because they did not want to find out for sure.

The respondents should have been required to come forward with some empirical evidence relating to public health and actual conditions in the lake. This was the type of evidence required by the Supreme Court when it had occasion to deal with similar issues. Before a court imposes liability for untold millions of dollars of expense, should it not know whether there is in fact any imminent hazard to health? Should it not at least require that an attempt be made to determine the existence of the alleged dangers?

Speculations by the courts below as to remotely possible occurrences inferred from the outer reaches of expert hypotheses cannot stand against known and observable facts before the court. Here such physical tests as were taken in Lake Michigan were taken by Milwaukee, and they negate the existence of pathogens in Illinois waters. Even more importantly, the fact that there has been no outbreak of any water-borne infections or diseases in Illinois certainly negates any claim that a hazard exists or has existed in the last hundred years that Milwaukee has been discharging effluent to Lake Michigan 25 miles away from Illinois.

Where a party claims that a hazard exists requiring injunctional intervention at hundreds of millions of dollars in cost, and where that alleged hazard has existed for a hundred years, the language and logic of the Supreme Court in *North Dakota* v. *Minnesota, supra,* should put an end to the controversy:

> "It is difficult for a court to decide issues of fact upon which experts equal in number and standing differ flatly, and when their conclusions rest on estimates upon the correctness of which the court, without technical knowledge, cannot undertake to pass. In such cases, the court looks about for out-

standing facts from which the lay mind can safely draw inferences as to the probabilities.

* * *

To attribute to such a minor but constant artificial incident a phenomenal effect for two whole summer seasons without a recurrence since is to fly in the face of all reasonable probability. The evidence must be clear and convincing indeed to support such a theory. Instead of that, it is a combination of estimates and conjecture based on no accurate knowledge of the flow of the Mustinka before the ditches were put in, and depending greatly on a hypothetical detaining basin in the so-called Delta zone, existence of which the greater weight of the evidence negates.

* * *

The conclusion we have come to on the main issue of fact—that Minnesota is not responsible for the floods of which complaint is made—makes it unnecessary for us to consider this evidence as to a practical remedy for them, and requires us to leave the opinions and suggestions of the expert engineers for the consideration of the two states in a possible effort by either or both to remedy existing conditions in this basin." 263 U.S. at 385-388.

While thousands of pages of transcript and hundreds of exhibits have been adduced, the record as a whole does not establish a right to relief with sufficient clarity to necessitate a decision on the effect of the federal statutes and the underlying administrative action upon the federal common law of water pollution nuisance the respondents advocate.

This Court has repeatedly held that speculations based on hypotheses of experts do not rise above demonstrated and demonstrable facts. Here the facts are clear. No pathogens have been shown in Illinois waters.

No effects of pathogens have been shown in Illinois. No accelerated eutrophication resulting from defendants' discharges has been shown in either Illinois' or Michigan's territorial waters. All we have is some expert hypotheses opposed by other expert hypotheses, followed by a never-ending and inconclusive chain of speculation.

B. Neither Illinois Nor Michigan Require the Level of Control of Overflows Ordered by the Courts Below.

If the hazards which Illinois and Michigan allege are posed by Milwaukee's overflows were truly a concern, rather than being a strawman for this litigation, one would assume that a requirement to eliminate all overflows would be imposed by both Illinois and Michigan on their own municipal sewage discharges to protect their own citizens. In fact, neither Illinois nor Michigan require the total elimination of all overflows as ordered by the courts below.

In *Missouri* v. *Illinois, supra,* this court stated:

> "Where, as here, the plaintiff has sovereign powers, and deliberately permits discharges similar to those of which it complains, it not only offers a standard to which the defendant has the right to appeal, but as some of those discharges are [at points where they could cause the injury complained of], it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it that courts should not be curious to apportion the blame." 200 U.S. at 522.

Illinois does not prohibit combined sewer overflows nor require their complete elimination. Illinois Pollution Control Board Rules and Regulations, Chapter 3:

Water Pollution, § 602(c) (1976) (P.Ex. 171 at 30-31) states in relevant part:

> "All combined sewer overflows and treatment plant bypasses shall be given sufficient treatment to prevent pollution or the violation of applicable water quality standards. Sufficient treatment shall consist of the following:
>
> (1) All dry weather flows, and the first flush of storm flows as determined by the Agency, shall meet the applicable effluent standards;
>
> (2) Additional flows, as determined by the Agency but not less than ten times the average dry weather flow for the design year, shall receive a minimum of primary treatment and disinfection with adequate retention time;
>
> (3) To the extent necessary to prevent accumulations of sludge deposits or depression of oxygen levels, flows in excess of those described under paragraph (c)(2) above shall be treated by retention and return to the treatment works or otherwise. When the Agency finds it necessary, part or all of such excess flows shall be treated to substantially remove floating debris and solids."

The above regulation means that only dry weather flows and the "first flush" of storm flows (as determined by the Illinois EPA) are required to meet applicable effluent standards.[23] After the "first flush,"

---

[23] Applicable effluent standards in Illinois range from 4 mg/l BOD5 and 5 mg/l SS all the way up through 30 mg/l BOD5 and 37 mg/l SS, depending upon the volume of waste discharged (expressed in the Illinois regulations as "population equivalents") and the "dilution ratio" of the effluent into the receiving body. Illinois Pollution Control Board Rules and Regulations, *supra*, §§ 104 and 404 (P.Ex. 171 at 3, 22-25). The only exception to the

storm flows equal to ten times the average "dry weather flow" need to receive only "primary treatment and disinfection with adequate retention time." Storm flows in excess of the "first flush" and ten times the

---

foregoing is Lake Michigan, where an effluent limitation of 4 mg/l BOD5 and 5 mg/l SS is specified without regard to waste volumes or dilution ratios. (Because of the drainage hydrology of Illinois, only Chicago and Waukegan discharge occasional overflow sewage effluent into Lake Michigan, with their normal discharges ultimately flowing into the Mississippi River, like all other Illinois sewer systems which discharge into waters to the west. Significantly, the Chicago and Waukegan discharges to Lake Michigan are sewer overflows which do not meet Lake Michigan discharge standards! See "Supplemental Response of the State of Illinois to Applicants' Motion for Stay Pending Certiorari," dated May 7, 1980, at 6-7.)

Except for discharges to certain bodies of water, the applicable effluent standards are intended to make all waters in Illinois suitable for "general use" and "public and food processing water supply use." Illinois Pollution Control Board Rules and Regulations, *supra*, §§ 104 and 301-303 (P.Ex. 171 at 5, 19-20, Tr. 3719). Thus, the effluent standard which must be met by the "first flush" of storm flows from combined sewer overflows will vary throughout Illinois, even though the waters into which such discharges are made will often have identical designated "uses."

The Illinois regulations themselves do not define "first flush," but the Illinois EPA has promulgated "Procedures for Determining Compliance With Rule 602(c) of Chapter 3: Water Pollution Regulations of the Illinois Pollution Control Board" (Technical Memorandum 3, June 1, 1977) which states as follows:

> "The storm chosen to determine first flush effects must have a minimum recurrence interval of one year."

In contrast, the District Court's remedy of "complete elimination" of sewer overflows requires Milwaukee to construct a sewer system with a capacity sufficient to contain the largest storm of record in Milwaukee during the 37-year period from 1940 to 1977 (Pet. App. D-3). Of course, it is entirely possible that the largest storm of record in Milwaukee during the 1940-1977 period has a recurrence interval significantly greater than 37 years (i.e., a storm having a recurrence interval of 100 years—or 1,000 years, for that matter—could have occurred during the 37 year period).

average dry weather flow need not receive any treatment whatsoever except to the extent necessary to prevent "accumulations of sludge deposits or depression of oxygen levels," or to remove "floating debris and solids" if the Illinois EPA determines that to be necessary.

Significantly, the Illinois regulations were amended in 1977 to expressly *exempt from compliance* with even the foregoing requirements (which have not been amended to date) all combined sewer overflows with respect to which appropriate steps have been taken to secure federal construction grant funds under Sec. 201(g) of FWPCA (§ 1281(g)), until completion of construction under the grant provided. Illinois Pollution Control Board Rules and Regulations, *supra,* § 602(d) (1976) states in relevant part:

> "Compliance with paragraph (c) of this Rule 602 shall be achieved on or before the following dates:
>
> * * *
>
> (2) All combined sewer overflows within the Metropolitan Sanitary District of Greater Chicago, by December 31, 1977;
>
> (3) All other combined sewer overflows, by December 31, 1975.
>
> (4) *The compliance dates set by (d)(2) and (d)(3) shall be met unless:*
>
> (aa) The discharger's combined sewer overflow is eligible for a construction grant under Section 201(g) of the FWPCA; and,
>
> (bb) The discharger has filed an application for a construction grant on or before March 1, 1977; and,

(cc) The discharger has timely taken all appropriate pre-grant and post-grant actions necessary to the specific grant step for which the discharger is then eligible.

* * *

(7) The exemption provided by (d)(4) above shall terminate upon completion of construction under the grant provided and compliance with the provisions of this Rule shall thereafter be required." (emphasis added)

In short, Illinois requires only the "first flush" of storm flows from combined sewers to meet applicable effluent limitations, and even that requirement is waived until federal funding has been received and related construction has been completed. That is a far cry from the onerous burden imposed upon Milwaukee by the courts below of requiring *all* combined sewer overflows to meet applicable effluent limitations regardless of cost or the availability of federal financial assistance.[24]

The State of Illinois, through its Environmental Protection Agency, has permitted the City of Waukegan, which is served in part by combined sewers, to build a treatment plant which will allow bypasses of sewage into Lake Michigan from what is defined as a "one-year storm" (Tr. 13444-45, 13450).

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[24] In upholding the District Court's requirement that all of Milwaukee's combined sewer overflows be "eliminated" (i.e., treated to meet applicable effluent limitations), the Court of Appeals incorrectly believed that that remedy was equivalent to what Illinois requires of its own dischargers:

> "These requirements [Illinois Pollution Control Board Rules and Regulations, *supra*, § 602(c)] seem to be comparable to the treatment of overflows from the collection and conveyance system described by the district court." 599 F.2d at 173 (Pet. App. A-39).

Illinois permits the City of Chicago to discharge large volumes of untreated sewage into Lake Michigan by means of reversals or "backflows" of the Chicago Canal System. Such backflows into Lake Michigan of hundreds of millions of gallons of polluted river water containing untreated sewage have occurred 19 times from 1959 through 1978, with 12 of those in the last 10 years (Tr. 4026-4034; D.Ex. 170 p. 9, Tr. 4024; GAO *Report by the Comptroller General of the United States,* CED-79-77, *supra* at Vol. 1, p. 18).

In the City of Chicago, where combined sewers service one of the largest areas and population in the United States, the planned TARP project, even if finally completed at a cost estimated to be between $4 billion and $11 billion, *will not eliminate overflows. Id.* at Vol. 1, pp. 4-5.

With respect to the State of Michigan, on September 9, 1977, that State entered into a consent judgment in Civil Action No. 77-1100, in the United States District Court for the Eastern District of Michigan, wherein the United States of America was the plaintiff and the State of Michigan and the City of Detroit were defendants. That consent judgment does not require the "elimination" of combined sewer overflows. Rather, it mandates a program for the attainment of "control" of overflows from the combined sewer system in a cost effective manner (*United States* v. *State of Michigan et al,* E.D. Mich. No. 77-1000, Sept. 9, 1977, judgment p. 29).

The difference in cost between a system which has the capacity to eliminate overflows totally, as distinguished from an environmentally sound, cost-effective system to control overflows, is hundreds of millions of

dollars in Milwaukee alone. The precedental effect of requiring total elimination of sewer overflows would be fiscally disasterous to the nation. The imposition of such a burden on Milwaukee at the behest of sovereign states which do not impose similar burdens on their own citizens cannot be justified by reliance upon federal common law.

III. THIS ACTION SHOULD HAVE BEEN DISMISSED ON THE GROUND: (1) THAT THE COURT HAD NO JURISDICTION OVER THE PERSON OF THE DEFENDANTS, OR (2) THAT THE VENUE IN THE ACTION WAS IMPROPERLY LAID IN THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, OR UPON BOTH SUCH GROUNDS.

This action was commenced in the United States District Court for the Northern District of Illinois by the filing of a complaint alleging three causes of action, the first based upon the federal common law of nuisance, and the second and third based upon state statutory and common law. The first was held by the Court of Appeals to be controlling, so as to preclude the latter two from being addressed. 599 F.2d at 177 N.53 (Pet. App. A-46 n.53).[25] The complaint was served upon the defendants pursuant to the Illinois "longarm" statute, Ill. Rev. Stat. ch. 110, § 17 (1971) (see "Statutory Provisions Involved", *supra*).

---

[25] There can be no diversity jurisdiction in this case. As this Court pointed out in *Illinois* v. *Milwaukee*, *supra*:

> "It is equally well settled that a suit between a state and a citizen of another state is not a suit between citizens of different states for the purposes of diversity of citizenship jurisdiction." 406 U.S. at 97 n.1 (Pet. App. I-6 n.1).

Thus, dismissal of the federal count carries with it the two state law counts.

Subsequent to the service of the complaint, Milwaukee moved to dismiss the action on the ground that the court lacked personal jurisdiction and that venue of the action did not properly lie in the Northern District of Illinois. The trial court (Judge Bauer presiding) denied these motions. *Illinois* v. *Milwaukee,* 4 E.R.C. 1849, 1850 (N.D. Ill. 1972) (Pet. App. H-4).

The facts in this case clearly establish that none of the petitioners have acted in any way which would justify the conclusion that they had either committed "a tortious act *within*" the State of Illinois (the statutory requirement to come under the Illinois long-arm statute) or that they had the requisite "minimal contacts" with the State of Illinois to satisfy the constitutional prerequisite to the exercise of power over them by the State of Illinois. This is not a products liability case where it is arguable that the act of a manufacturer in shipping a product into a state is that type of act by which the manufacturer purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws. *Cf., International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945); *Hanson* v. *Denckla,* 357 U.S. 235 (1958). Here the defendants do nothing in the State of Illinois. They take no act to purposely avail themselves of the privilege of conducting activities within the State of Illinois; they receive no benefits or protection from the laws of the State of Illinois. The courts below brushed aside the difficult statutory and constitutional issues presented by the facts of this case and Milwaukee's motion to dismiss by summarily rejecting the motion.

The treatment of the venue issue below was equally summary. The courts relied upon 28 U.S.C. § 1391(b), which states:

> "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

Specifically, the courts below relied upon the words "or in which the claim arose," and opined that the claim of the State of Illinois arose in the Northern District of Illinois "where the injury was suffered." This was error. The courts below are bound by relevant federal authority. See, *Cole* v. *Trustees of Columbia University,* 300 F.Supp. 1026, 1029 (S.D.N.Y. 1969) and Sec. 505(c)(1) of FWPCA (§ 1365(c)(1)), which statute provides as follows:

> "Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located."

Though Milwaukee pointed out that, as a matter of law, the claims made against them in the complaint were inherently "local" in nature, the District Court concluded that the claims were "transitory" (Pet. App. H-3). The Court of Appeals held that this distinction was not significant (Pet. App. A-5 and 6). In reaching these conclusions, the courts disregarded the decisions of this Court which held that nuisance actions are "local" (their locus is their source) and not "transitory" (their locus does not follow to any place of asserted damage). *Ladew* v. *Tennessee Cop-*

per Co., 218 U.S. 357 (1910); *Mississippi and M.R. Co.* v. *Ward*, 2 Black. 485 (1863). The courts below also disregarded the long established principle that actions against municipal corporations are themselves inherently local in nature, so much so that absent a specific statutory provision to the contrary, they cannot be brought outside the judicial district where the municipal corporation is situated. See, Annot., 93 A.L.R. 500 (1934); *Parks Co.* v. *City of Decatur, Ill.*, 138 F. 550 (6th Cir. 1905); *Markham* v. *City of Newport News, Va.*, 184 F.Supp. 659 (E.D. Va. 1960).

Now this Court has clarified the meaning of § 1391 (b) in *Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979). As clarified, venue was improperly laid in the Northern District of Illinois, thus requiring reversal and a direction to dismiss. This Court stated:

> "In our view, therefore, the broadest interpretation of the language of § 1391(b) that is even arguably acceptable is that in the unusual case in which it is not clear that the claim arose in only one specific district [footnote omitted] a plaintiff may choose between those two (or conceivably even more) districts that with approximately equal plausibility—in terms of the availability of witnesses, the accessibility of other relevant evidence, and the convenience of the defendant (but *not* of the plaintiff)—may be assigned as the locus of the claim." 443 U.S. at 185 (emphasis in original).

In this case *all* of the conduct complained of occurred in the Eastern District of Wisconsin; very few of the witnesses (including respondents' witnesses) resided in the district of trial; many of Milwaukee's witnesses and *all* of the petitioners reside in the East-

ern District of Wisconsin, not in the Northern District of Illinois.

In the absence of personal jurisdiction and appropriate venue, this action should be dismissed.

CONCLUSION

Petitioners respectfully request the following relief:

1. That the decision of the Court of Appeals be reversed and remanded with directions to order dismissal of the complaint herein on the grounds that:

   a. *In personam* jurisdiction was lacking as to all defendants;

   b. Venue was improperly laid in the Northern District of Illinois;

   c. There was insufficient evidence to sustain a finding of nuisance, and neither of the complaining states require the point source controls sought and imposed herein;

   d. FWPCA controls both the cause of action and the remedy, leaving no function for the federal common law of water pollution nuisance;

   e. The action should have been referred in the first instance to the Wisconsin Department of Natural Resources or the EPA;

   f. The courts below should have deferred to the result obtained in the statutory Wisconsin state court proceeding enforcing Milwaukee's FWPCA permits prior to the entry of judgment below.

2. In the alternative, that the portion of the Court of Appeals' decision relating to the elimination of sewer overflows should be reversed and remanded with directions that:

a. The issues involved in this portion of the decision be referred to the Wisconsin Department of Natural Resources or the EPA for a determination of the cost-effective level of sewer overflow control, and the proper timing for implementation of such control under FWPCA, consonant with the availability of federal funding, and that such determination be implemented by the Court of Appeals; or

b. The cause be remanded to the District Court, before a judge other than the original trial judge, for a new trial on the issues of the degree to which sewer overflows should be controlled pursuant to FWPCA and the timing of the implementation of such control measures, with particular consideration to be given to the availability of federal funding and the point source controls imposed by the plaintiff states in respect of discharges in their own jurisdictions.

3. That the Court award costs to the petitioners and such other and further relief as the Court may deem just and appropriate.

Respectfully submitted,

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No. 79-408

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONERS PURSUANT TO SUPREME COURT RULE 35.5

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November 21, 1980

No. 79-408

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS PURSUANT TO SUPREME COURT RULE 35.5

Pursuant to rule 35.5 of this Court's Rules, Milwaukee draws the Court's attention to a recent decision of the Court of Appeals for the Fifth Circuit in *United States v. Dixie Carriers, Inc.*, decided on October 10, 1980 and published in the Environmental Law Reporter on November 14, 1980, 15 ERC 1017, because it relates to a matter discussed in Milwaukee's previously filed briefs.

Milwaukee's brief in chief at 28 n.9 and its brief in reply to the briefs of *amici curiae* at 6 stated, as Milwaukee believed, that the legislative history of the Federal Water Pollution Control Act Amendments of 1972 did not mention "federal common law." No opposing brief directly challenged those statements.

However, the above-referenced decision of the Court of Appeals sets forth a quotation that Congressman Dingell inserted in the Congressional Record's report of the House's consideration of the Conference Committee Report on the 1972 date of the passage of the FWPCA amendments. This quotation contains the phrase "federal common law." Congressman Dingell was quoting from a report of the Committee on Government Operations, issued before the 1972 enactment of FWPCA, recommending resort under prior law to such "federal common law" by the Coast Guard in policing oil spills.

The decision deals with the question whether FWPCA provides the exclusive remedy available to the United States to recover expenses incurred in an oil spill cleanup effort. The United States argued that in addition to proceeding under FWPCA, it could also proceed under the federal common law and the Refuse Act of 1899. The Court of Appeals for the Fifth Circuit disagreed and held that the remedy provided in FWPCA was exclusive.

The Court of Appeals noted that the government relied upon the following quotation so appearing in the House records:

> "The Coast Guard should (a) vigorously enforce the Refuse Act of 1899 and the civil penalty provisions of the Water Quality Improvements Act of 1970 against all persons who unlawfully discharge oil into the Nation's waterways, and (b) utilize against unlawful oil dischargers other remedies such as suits under the Federal common law of public nuisance, or for reimbursement of clean up costs, or for damages." ____ F.2d ____, 15 ERC 1017, 1021. (This quotation of the inserted quotation appears in *Legislative History* at 252.)

The Court noted that this quotation dealt with estuaries in and around the State of Washington and did not support the government's position. Milwaukee, too, would note that the subject under discussion when the quotation came into the record was oil spills, and not any of the matters before the Court in this case. The quotation is hardly operative "legislative history" in respect

of the provisions of FWPCA under scrutiny here, and it does not detract from the burden of Milwaukee's positions in this case.

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IN THE

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OCTOBER TERM, 1979

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT PEOPLE OF THE STATE OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

1. Under Article III of the Constitution and the Judicial Code, what are the constitutionally proper forums when a State seeks to prevent injuries to its citizens from the tortious acts of a citizen of another State? Can a complaining State be constitutionally compelled to seek relief in either the state courts or the state administrative agencies of a defendant citizen?

2. Where the separate and independent grounds for relief were asserted in the District Court—one based on federal common law, one based on an Illinois state statute and one based on state common law—was not the District Court correct in applying federal law to the federal common law claim and state law to the state statutory and state common law claims? Under *Erie* v. *Tompkins,* 304 U.S. 64 (1938) and *Guaranty Trust Co.* v. *York,* 326 U.S. 99 (1945), is not this Court constitutionally compelled to apply state statutory and common law to these claims having their source in state law?

3. Where a federal court fashions "interstitial" federal common law to implement the general goals of a Congressionally established statutory program, does the federal court have constitutional authority to oust (preempt) concurrent state statutory and common law remedies where the Congress has expressly declared its intent to preserve state common law and state statutory remedies?

4. In the enactment of the 1972 Amendments to the Federal Water Pollution Control Act (P.L. 92-500) and the 1977 Amendments to the same Act (P. L. 95-217) did Congress intend to oust state statutory and common law remedies from operation or did Congress intend to preserve the concurrent operation of those state statutory and common law remedies?

5. Where Congress has been repeatedly informed through the pronouncements of this Court, *e.g., Vermont* v. *New York,* 417 U.S. 270, 275 n. 5 (1974), and the express holdings of the

lower courts that the federal interstitial common law announced by this Court in *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972) and *Washington* v. *General Motors Corp.,* 406 U.S. 109 (1972) has not been preempted by either the Clean Air Act or the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500) and Congress has not changed the law, can Congress be held to have ousted interstitial federal common law from the fields of air and water pollution control?

6. Has a violation by Milwaukee of Illinois' rights under the Illinois Environmental Protection Act, state common law and federal common law been established where both the District Court and the Court of Appeals found—after an exhaustive review of the evidence—and on the basis of uncontested evidence that:

a. It is undisputed that Milwaukee discharges huge volumes of raw or inadequately treated sewage into Lake Michigan containing billions of disease-causing virus and bacteria on a frequent basis. This information is based on both undisputed general scientific knowledge about the content of human feces as well as voluminous sample data for fecal bacteria.

b. It is undisputed that these pathogens are carried by shore parallel currents into Illinois waters of Lake Michigan on a periodic basis. There was no dispute among all parties' experts that such transport does take place and that the time of travel can be as little as two days. The only dispute among experts was as to the frequency of such transport and all agreed the frequency could vary from year to year. All of the expert testimony was based on massive amounts of data collected from Lake Michigan as to current, speed, persistence, and direction, as well as data on dispersion.

c. It is undisputed that bacterial pathogens survive as long as four days to eight days and that viruses survive at temperatures found in Lake Michigan for several weeks to months.

d. It is undisputed and two courts found that Milwaukee viruses and pathogenic bacteria in Illinois water create a serious health hazard for swimmers and that

viruses can survive the treatment processes at drinking water plants thus creating a severe health hazard.

e. It is undisputed that large numbers of people in Illinois and in Wisconsin are being infected with enteric viral disease, but for a variety of reasons—including the fact that for every 100 persons infected only one will exhibit evidence of a disease—it is impossible to develop an epidemiological link between the source of contamination and the infected victim.

f. It is undisputed that there are bacterial counts on northern Illinois beaches which are clearly of human origin, but that it is impossible to identify the discharge source of this bacteria. Bacteria in open waters of Lake Michigan (a) are invisible to the naked eye and (b) do not carry certificates of origin.

7. Has a violation by Milwaukee of Illinois' rights under the Illinois Environmental Protection Act, state common law, and federal common law been established when both the District Court and the Court of Appeals found—after an exhaustive review of the evidence—that:

a. Phosphorus is the primary chemical ingredient which accelerates the aging or "eutrophication" of Lake Michigan, changing it from a clear fresh body of water into a lake clogged with algae;

b. Milwaukee's antiquated sewage treatment plants discharge over 50% of the total sewage load of phosphorus into *all* of Lake Michigan, with Milwaukee's raw sewage overflows adding an untold additional amount;

c. Lake Michigan is becoming increasingly eutrophic;

d. The phosphorus and other nutrients as well as the algae they produce travel throughout the nearshore zone without regard to invisible state borders;

e. It is uncontested that communities along the north shore of Illinois experience increasing algal taste and odor problems with drinking water drawn from Lake Michigan;

f. It is uncontested that if left unchecked this eutrophication process will harm fish spawning areas.

8. After 13 years of interminable administrative and judicial delay—exacerbated in great part by Milwaukee's constant and repeated maneuvers to avoid a judicial determination of liability and the imposition of an effective judicial remedy—and after detailed determination of both liability issues and the remedy issues by both the District Court and the Court of Appeals, can Milwaukee create further delay by invoking the same tired arguments of which this Court rejected ten years ago where:

a. The permit system cited by Milwaukee is administered by a Wisconsin state agency. Illinois cannot be constitutionally compelled to try its complaints in the state courts or agencies of the defendant;

b. By their own terms the Wisconsin permits provide the same basic relief as contained in the Amended Judgment Order, but have no legal effect because the permits are limited to five years and the relief requested here will take a minimum of 13 years. The permits contain no deadlines for achievement of any effluent controls on any overflows even though the permits—like the Amended Judgment Order here—call for *elimtnation* of the overflows in the separated area which comprise 95% of the sewer collection area;

c. The state permits expressly disclaim any legal connection with the eleventh hour consent decree between Wisconsin administrative officials and Milwaukee entered into on the eve of the federal court's decision here;

d. The eleventh hour consent stipulation between Milwaukee and Wisconsin officials is enforceable only in Wisconsin courts and is subject to consensual changes between Milwaukee and Wisconsin officials at any time;

e. The eleventh hour consent decree is so open-ended that the deadline for completion of the combined sewer area corrective measures—which are as yet undefined three years after the consent stipulation was entered—may never be completed, and at the very least, may not be completed until the year 2025.

9. Will this Court be deceived by Milwaukee's and the *amici* sewage agencies' audacious attempt to obtain a judicial amendment to the Clean Water Act giving judicial approval of

"cost-effective" water quality standard violations where the Congress has dictated a completely different definition of "cost-effective" under § 212 and 40 C. F. R. Part 35, Subpart E, Appendix A, ¶ 4b—i.e., the least cost method necessary to achieve water quality standards through § 301(b)(1)(C); and where Milwaukee has been unsuccessful in selling its argument to Congress?

10. Where Milwaukee consciously and intentionally discharges hundreds of millions of gallons of raw and inadequately treated sewage into Lake Michigan every year, and where this sewage is carried with Milwaukee's knowledge into Illinois waters on a regular basis, endangering Illinois' beaches and water supply:

a. Does a federal District Court in Illinois have *in personam* jurisdiction?

b. Was venue proper in the District where the injury occurred?

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Statutory Provisions Involved

The following provisions are lengthy and are set out in a separate appendix.

I. *U.S. Constitution*

A. Article III, Section 2

B. Article VI, cl. 2

II. *Federal Statutes Governing Subject Matter Jurisdiction and Choice of Law*

A. 28 U.S.C. § 1251

B. 28 U.S.C. § 1652

III. *State Statute Relating to Causes of Action Asserted*

A. Ill. Rev. Stat. ch. 111½, § 1012

B. Ill. Rev. Stat. ch. 14, §§ 11, 12

IV. *Statutes With Respect To In Personam Jurisdiction*

A. Fed. R. Civ. P. 4(e)

B. Ill. Rev. Stat. ch. 110, §§ 16, 17

V. *Statute Governing Venue*

A. 28 U.S.C. § 1391(b)

VI. *Statutory Provisions Relating to Defenses by Milwaukee*

A. Cost-Effective

1. 33 U.S.C. § 1292(2)(B), (C)

2. 40 C.F.R. Part 35, Subpart E, Appendix A [43 Fed. Reg. 44087 (September 27, 1978)]

B. Statutory Provisions Relating to Congressional Intent to Preserve the Application of State Statutory Law and Common Law to Impose More Stringent Antipollution Control Through Either Administrative or Judicial Action

1. 33 U.S.C. § 1365(e)

2. 33 U.S.C. § 1370

No. 79-408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT PEOPLE OF THE STATE OF ILLINOIS

STATEMENT OF THE CASE

Introduction

This controversy has its factual origins in the inestimable value of Lake Michigan as the principal source of water recreation and drinking water supply for millions of residents of northern Illinois. To the congested urban population of northeastern Illinois, the Illinois shoreline of Lake Michigan—particularly in the stifling heat of a midwestern summer—represents an invaluable natural treasure.

Unfortunately, the Illinois waters of Lake Michigan are extremely vulnerable to discharges of pollutants. Pollutants discharged into Lake Michigan are not uniformly dispersed into the Lake. Instead, pollutants are often transported up or down the shoreline depending on the direction of wind driven shore-parallel currents. Under winds of various speeds and persistence these shore-parallel currents can carry a polluted mass up to 60 miles along the shoreline [Pl.Ex. 20 at 115-116]. Milwaukee Harbor is only 37 miles from the Illinois state line (TR. 1020), and the defendants' South Shore treatment plant is only 25 miles from the state line (*See* Map exhibit, Pl.Ex. 137; Pet. App. at B-10 to B-12).*

Milwaukee's witnesses admit that pollutants discharged by Milwaukee will be transported into the Illinois waters of Lake Michigan.

> "Q. There is no question that everything you have seen indicates that a substance which is placed at Milwaukee will reach Illinois waters, isn't that right?
>
> A. Correct, at some frequency."
>
> Dr. Donald Pritchard, T.R. 7175

There is a second phenomenon which increases the hazards of pollution in Lake Michigan. Coupled with the transport of pollutants over long distances by these shore-parallel currents is the fact that large masses of pollutants discharged into the Lake disperse very slowly. Under adverse conditions the dilution from the original pollution strength could be as little as 15% at the time Milwaukee's pollution reached the state line (Pet. App. B-18). Defendants' witnesses at trial—using dilution tests they themselves performed—admitted that dilution of pollutants discharged at Milwaukee would be as low as 5 to 1 when they reached Illinois waters (TR. 8920; Pet. App. B-18).

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* Hereinafter the Appendix to the Petition for Certiorari is cited as "Pet. App.," the Joint Appendix as "J.A.," and the Appendix to this brief as "Ill. App."

Illinois' concern over contamination of Lake Michigan has focused on three general categories of pollutants: 1) industrial contaminants; 2) nutrients; and 3) enteric pathogens.

Industrial Contaminants. While serving as an invaluable recreation resource and source of drinking water, southern Lake Michigan has also served the water supply needs of a vast industrial complex concentrated in south Chicago and the Indiana shoreline of Lake Michigan. Within this Chicago-Gary complex sits the largest production capacity for steelmaking in the United States as well as extensive oil refining facilities. In years past these industrial facilities used Lake Michigan as a waste sink, dumping into the Lake each day billions of gallons of wastewater contaminated with oil, greases, heavy metals and ammonia. This industrial contamination had several adverse effects: 1) it was harmful to the animal life in the Lake—particularly the bottom dwelling organisms essential to the food chain in the Lake; 2) it caused taste and ordor problems in municipal water supplies; and 3) it was hazardous to the health of persons who consumed the water.

Nutrients. Nutrients, particularly phosphorus, dramatically affect the water quality of a lake. Lakes are classified by water chemistry experts and biologists as to their "trophic" status, i.e., the quantity and quality of nutrients and biological material in the lake (TR. 2823). In an "oligotrophic" lake the water is clear and clean; in a "eutrophic" lake the water is cloudy and murky from the growth of suspended plant life known as phytoplankton (TR. 2824).

As a lake becomes more and more "eutrophic," objectionable plants are found along the shores, and when they die off, they create obnoxious smells (TR. 2826). Low levels of unobjectionable suspended algae are replaced by obnoxious forms of algae that can cause a scum on the water surface (TR. 2837). These obnoxious forms of algae can cause severe taste and odor problems in public water supplies (TR. 12527). The

nuisance and water quality degrading potential of eutrophication is not merely hypothetical. Communities along the entire lakeshore now experience taste and odor problems caused by algae in the water they get from Lake Michigan (TR. 13530). This eutrophication process also poses a threat to fish spawning grounds (TR. 12727).

Lake Michigan is becoming more and more eutrophic (TR. 2883, 3297). Several experts testified that, unless corrective action is taken to reduce the nutrient load from sewage plants, southern Lake Michigan is likely to become like western Lake Erie or Green Bay, which are notoriously degraded bodies of water (TR. 12644, 12647).

Enteric Pathogens. Raw and inadequately treated sewage contain enormous numbers of pathogenic[1] organisms, both bacteria and viruses. Any urban center like Milwaukee contains persons who are infected with pathogens and who are shedding bacterial and viral pathogens through their feces (TR. 3101, 2174).

Bacteria and viruses are two totally different pathogenic groups. Within the bacteria group there are hundreds, if not thousands, of different strains of pathogenic bacteria. For example, Salmonella has over 400 different subtypes, and Shigella has over 600 different subtypes (TR. 3053). Because of the enormous number of individual bacterial pathogens, no single test can identify the bacterial pathogens which may be present in water (TR. 3056, 3097). Instead, public health officials use an indicator—a nonpathogenic bacteria called "fecal coliform"—which has been statistically shown to be present in fecally contaminated water when pathogenic bacteria are also present.[2]

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[1] The noun "pathogen" or the adjective "pathogenic" refers to the disease-causing nature of these organisms (TR. 2155).

[2] Unfortunately, the absence of fecal coliform bacteria has no correlation with the presence of viruses. Even a finding of no fecal coliform does not mean viruses are not present—viruses have been found in water free from fecal coliform (TR. 2201).

Viruses are the more serious group of fecal pathogens. A virus is an incredibly small object less than one millionth of an inch in diameter (TR. 10171). A single gram—1/454 pound —of human feces from an infected individual can contain millions of viruses (TR. 10278). Depending on the level of disease within the community, raw sewage can contain from approximately seven thousand to several hundred thousand viruses per liter (TR. 2180). Viruses are highly infectious and as little as one virus can cause disease (JA 157-158).

Many people infected by enteric viruses (viruses which pass from the body in feces) do not show any disease symptoms. Viruses simply multiply in the lining of the gut and are excreted with the feces without causing any disease symptoms (TR. 2157). A thousand people may become infected before one shows a clinical symptom of disease.[3] Yet these asymptomatic infected carriers pass on just as many viruses as a diseased person (TR. 2145, 2157, 2174).

The common denominator of all these enteric viruses is that they leave the body of a carrier by means of the feces (TR. 2147). Thus, fecal material is a necessary link in the transmission of the virus to the next victim. This is called "fecal-oral transmission" (TR. 2155).

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[3] Actual disease symptoms only appear when a particular virus enters the bloodstream through the lymph glands (TR. 2143) and attacks a "target" organ, such as the heart, lungs, brain or central nervous system (TR. 2157). Polio is an enteric virus that attacks the tissue of the spinal cord (TR. 2161, 2165). Coxsackie virus causes pleurodynia—a disease of the covering of the lungs which causes a great deal of inflammation and pain (TR. 2164). Coxsackie B virus has as its target organ the muscle tissue of the heart causing such diseases as pericarditis (TR. 2167) and myocarditis. Myocarditis is a particularly severe and sometimes fatal heart disease in young children (TR. 2160). Coxsackie viruses also have been found to increase the incidence of birth defects (TR. 2167) and are suspected of triggering diabetes in susceptible individuals (TR. 13211). Hepatitis A is an enteric virus which attacks the liver (TR. 2168).

Viruses are incredibly difficult to detect with accuracy (TR. 12333). Beyond the difficulties of detecting for virus are the diagnostic and epidemiologic difficulties in tracing an enteric disease (i.e., caused by fecal-oral transmission). Because of the epidemiological problems of hidden carriers (infected persons without symptoms who may be in the chain of infection), lack of diagnosis, and lack of reporting (most cases are not reported), it is difficult, if not impossible, to trace fecal pathogen infection back to a source (TR. 2192, 13195-13198, 13223-13224).

Contrary to the statements by Milwaukee, Illinois is currently suffering fecal contamination of its northern Illinois beaches (Pl.Ex. 172, 173; TR. 3111, JA 341). Moreover, Illinois residents are currently suffering enteric bacterial and viral diseases (TR. 2155; Df. Ex. 83).

A. Illinois' Efforts To Abate Pollution Of Lake Michigan

1. The Lake Diversion Studies and the *Maris* Report

Illinois did not fully appreciate the seriousness and the interstate transmission of these pollution problems until Wisconsin and other Great Lakes States reopened the lake diversion litigation in 1959 asking that Chicago be ordered to return its treated sewage to Lake Michigan. *Wisconsin* v. *Illinois* (Nos. 1, 2 and 3 Original).

As part of the hearings in that case, the United States Public Health Service conducted extensive studies of Lake Michigan. These studies, conducted in the early 1960's, disclosed serious interstate pollution problems in Lake Michigan as to nutrients, enteric pathogens and industrial pollutants. The results of these studies—particularly as to nutrients, enteric pathogens, and pollutant transport—were incorporated into extensive findings of fact filed by Special Master Albert Maris on December 8, 1966, and adopted by this Court on June 12, 1967 (388 U.S. 426). Judge Maris' report clearly sets forth the

serious pollution problems plaguing Lake Michigan. (*See, e.g.,* Report of the Special Master at 183-190 on nutrient eutrophication.)

Judge Maris' findings as to virus are extremely pertinent here. As to drinking water supplies at water treatment plants, he concluded:

> "...It is known that virus particles can pass through the filtration process under conditions which might happen unintentionally for short periods of time in actual water treatment plants under modern practices, and that the viricidal efficiency of chlorine is considerably less than for bacteria, and is subject to wide variations. There is not known at this time any technique adaptable to field operating conditions which can insure that consistent removal of all viruses from a raw water supply subject to sewage pollution . . . *it would not be justifiable from the viewpoint of public health to subject any water supply to any contaminant known to contain or thought likely to contain pathogenic viruses,* if an alternative method of disposing of the contaminant is available."
>
> *Id.* at 205 (emphasis added)

As to the epidemiologic difficulty of attributing viral disease to a specific fecal source, Judge Maris found:

> "Public health statistics are commonly limited to a few diseases which are serious and epidemic, *and will not indicate significant differences in the incidence of viral diseases as between communities which use polluted sources of water and those which do not."*
>
> *Id.* at p. 205, 206 (emphasis added)

The extensive *Lake Currents* Report (1967) done by the Public Health Service as part of the diversion case, showed that pollutants could be transported great distances with very little dilution. (Report of Special Master, at p. 203-204). The scientist who conducted these studies was Captain James Verber of the United States Public Health Service, who testified as a witness for Illinois at the trial below. (Pet. App. B-11).

2. Illinois' Precarious Position

Illinois' Lake Michigan shoreline is relatively short —roughly 60 miles—and is sandwiched between States which have been nortoriously lenient in policing pollution of Lake Michigan by industrial and municipal polluters in their own States.

Near the Indiana/Illinois border sits a vast complex of steel mills which in years past dumped billions of gallons of contaminated wastewater daily into Lake Michigan. To the north, less than 40 miles from the Illinois/Wisconsin border sits the Milwaukee metropolitan area which, as the record in this case shows, discharges billions of gallons of raw and improperly treated sewage annually into Lake Michigan.

3. The Effort At Administrative Abatement Through the Federal Water Pollution Control Act

Prior to seeking judicial abatement against Milwaukee and other polluters in southern Lake Michigan, Illinois attempted to abate these discharges through extensive efforts at conciliation and negotiation under the administrative mechanisms of the Federal Water Pollution Control Act. 33 U.S.C. § 466. In 1965, Illinois participated in a two-state enforcement conference brought pursuant to Section 8 of the Federal Water Pollution Control Act.[4] This conference concluded that, *inter alia, "Interstate pollution endangering the health and welfare of persons* in a state other than that where the discharges originate *exists* in the waters of . . . *Lake Michigan"* (p. 1573) (emphasis added).

Unfortunately, few if any clear enforceable commitments were made to abate this interstate pollution. Even as to the weak requirements that were set, the individual States would

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[4] Conference, *In the Matter of Pollution of the Interstate Waters of the Grand Calumet River, Little Calumet River, Calumet River, Wolf Lake, Lake Michigan and Their Tributaries* (March 1965.)

often set deadlines—only to unilaterally extend them whenever the polluters desired.

Illinois tried again in 1967, this time asking that all of the pollution discharges into Lake Michigan be the subject of a conference under the Federal Water Pollution Control Act. Secretary of Interior Udall agreed:

> "Pollution subject to abatement under the Federal Act is pollution of navigable and interstate waters which *endangers the health and welfare* of any person. I have reports that *such pollution is occurring.*"
>
> Conference, *Pollution of Lake Michigan and Its Tributary Basin,* (First Session) Vol. 1, p. 107 (emphasis added)

Secretary Udall recognized the interstate nature of the problem: "Pollution crosses political boundaries; so must solutions." *Id.* at 105. He gave an example: "Oil that spills in the lake at Gary oozes onto the beaches at Milwaukee." *Id.*

Unfortunately, Secretary Udall's aggressive concern was not reflected in the actions of the conference. The proceedings dragged on from early 1968 for the next three years in a fruitless round of meetings characterized by the same basic flaws as the earlier conference. Most of the clean up commitments were extremely vague and incapable of enforcement. There was rarely a commitment to achieve specific results—either by municipal or industrial polluters. Even where there was a small portion of a commitment which was specific, the States would administratively allow polluters to ignore deadlines with impunity.

4. Illinois Seeks Judicial Abatement

Frustrated by the wholly ineffective conference procedure, the Illinois Attorney General and the Illinois legislature turned to state judicial remedies expressly preserved by Congress in the Federal Water Pollution Control Act, P.L. 84-660, § 8(b). First in 1969, the legislature statutorily confirmed the common

law power of the Attorney General to seek judicial abatement of pollution independent of claims of administrative remedies, primary jurisdiction and administrative permits. Ill. Rev. Stat., ch. 14, §§ 11, 12 (Ill. App. 4a).

Second, the legislature passed the Illinois Environmental Protection Act, ch. 111½, § 1001 *et seq.* which specifically provided that no person shall:

> "(a) Cause or threaten or allow the discharge of any contaminants into the environment *in any State* so as to cause or tend to cause water pollution *in Illinois,* either alone or in combination with matter from other sources . . ."
>
> Ill. Rev. Stat., ch. 111½, § 1012 (emphasis added)

Using these statutory tools and state common law power to abate public nuisances, Illinois brought a series of abatement actions in Illinois state courts against Illinois and out of state major polluters of Lake Michigan. Invariably these abatement actions disclosed that the pollution control requirements imposed by administrative agencies were often little more than a cruel hoax.[5]

In contrast, this judicial enforcement program for Lake Michigan was extremely successful. As a result of court orders, several of the most severe industrial polluters of Southern Lake Michigan—both in Illinois and Indiana—have constructed modern state of the art pollution control systems, typically involving both recycling and filtration of waste waters. In each case, detailed time schedules were set with firm enforceable deadlines.[6]

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[5] For example, both in Illinois and Indiana throughout the 1960's and 1970's, the basic agency order for pollution control for virtually all the steel rolling mill operations—which poured millions of pounds of oil and metals into Lake Michigan—was to combine the multiple outfall pipes into one or two big pipes and add water for dilution.

[6] *See, e.g., People of the State of Illinois* v. *United States Steel Corp. (South Chicago Works),* Circuit Court of Cook County, 69 CH 3334, recycle with zero discharge to Lake Michigan; *People of the*

(Footnote continued on following page)

In these cases, the Illinois courts have uniformly rejected every one of the procedural ploys raised here. *See, e.g., Metropolitan Sanitary District* v. *United States Steel Corp.*, 30 Ill. App. 3d 360, 332 N.E.2d 426 (1975), *cert. denied,* 424 U.S. 976 (1976); *People ex rel. Scott* v. *United States Steel Corp.*, 40 Ill. App. 3d 607, 352 N.E.2d 225 (1976).[7]

(Footnote continued from previous page)

State of Illinois v. *Republic Steel (South Chicago Works),* Circuit Court of Cook County, 69 CH 3675, recycle with zero discharge to Lake Michigan; *People of the State of Illinois* v. *United States Steel Corp. (Waukegan),* United States District Court for the Northern District of Illinois, Eastern Division, 72 C 2503, recycle with zero discharge to Lake Michigan; *People of the State of Illinois* v. *Youngstown Sheet & Tube Company (East Chicago, Indiana),* Circuit Court of Cook County, 71 CH 3818, complete recycle with sand filtration of remaining wastewater discharged to Lake Michigan; *People of the State of Illinois* v. *United States Steel Corp. (Gary Works),* Circuit Court of Cook County, 72 CH 258, complete recycle with sand filtration of remaining wastewater discharged to Lake Michigan. Many of these remedial court ordered programs have either been completed or are currently under construction.

[7] In invoking the power of the court to order the performance of remedial acts outside its territorial jurisdiction by a person over whom the court had *in personam* jurisdiction, Illinois relied on the following authority: *see Alexander* v. *Tolleston Club,* 110 Ill. 65 (1884); *White Star Mining Co.* v. *Hultberg,* 220 Ill. 578, 77 N.E. 327 (1906); *Craft* v. *I. D. & W. Ry. Co.,* 166 Ill. 580, 46 N.E. 1132 (1897); *The Salton Sea Cases (California Development Co.* v. *New Liverpool Salt Co.),* 172 F. 792 (9th Cir. 1909); *see* E. Messer, *Jurisdiction of A Court of Equity Over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State,* 14 Minn. L.Rev. 494 (1930). *See also Steele* v. *Bulova Watch Co.,* 344 U.S. 280, 289 (1952). Illinois' use of its statutory prohibition against water pollution and its state common law nuisance power against out of state polluters of Illinois waters was given express approval by this Court in its decision in *Ohio* v. *Wyandotte Chemicals Corp.,* 401 U.S. 493 (1971). *See also Ohio* v. *BASF Wyandotte,* 2 ELR 20338 (N.D. Ohio 1972).

B. *Illinois* v. *Milwaukee* In The Supreme Court Round One

With few exceptions, Illinois suits to abate Lake Michigan pollution were brought in state courts. One exception was *Illinois* v. *City of Milwaukee,* No. 49 Original filed December 9, 1970. Illinois' position was clear: the State wanted to invoke the original jurisdiction of this Court to avoid the delays resulting from "long drawn out contests in the lower courts." Illinois Statement and Brief in Support of Motion to File a Bill of Complaint, at 15. In support of its motion for leave to file, Illinois likened the suit to one against the State of Wisconsin itself, rendering jurisdiction a "constitutional imperative." *Id.* at 15-16.

The defenses raised by the Milwaukee defendants in *Illinois* v. *Milwaukee* were virtually identical to those now raised ten years later: (1) Illinois should be barred from proceeding in the Supreme Court because the three year old Federal Water Pollution Control Act conference provided an adequate administrative remedy. County Sewerage Commission Brief, at 8-9. (2) The Secretary of Interior had initiated abatement action and Milwaukee was under state agency abatement orders. *Id.* at 4. (3) The Court should bar judicial action and invoke the doctrine of primary jurisdiction. *Id.* at 9. (4) Illinois should be required to exhaust its administrative remedy before going to Court. *Id.* at 9. (5) The only judicial remedy available against Milwaukee was judicial review of the Secretary's actions in an action under the Administrative Procedure Act. City Sewerage Commission Brief, at 6.

On April 24, 1972, this Court rendered its decision in *Illinois* v. *Milwaukee,* 406 U.S. 91. The Court rejected *sub silentio* Milwaukee's claims of exhaustion of administrative remedies and primary jurisdiction, and declared that an interstitial *federal* common law was available as a supplemental judge-made remedy to effectuate the Congressional purpose in the Federal Water Pollution Control Act and related federal statutes dealing with water quality. (*See* discussion, 32-45 *infra*).

C. The Procedural History Of This Case

1. The Complaint

Immediately after this Court's 1972 decision, Illinois filed a complaint against Milwaukee in the United States District Court for the Northern District of Illinois. The complaint had three separate counts, each setting forth a different substantive right. Two counts had the source of the right asserted in state law as articulated in *Ohio* v. *Wyandotte Chemicals Corp.*, and one count was based on the interstitial federal common law articulated in *Illinois* v. *Milwaukee:* a) Count I charged Milwaukee with the creation of a federal common law nuisance; b) Count II charged Milwaukee with violation of statutory prohibitions against water pollution contained in the Illinois Environmental Protection Act, Ill. Rev. Stat., ch. 111½, § 1001 *et seq.;* and c) Count III charged Milwaukee with the creation of a common law nuisance under Illinois law.

2. Milwaukee's Pre-Trial Maneuvers

For four years, Milwaukee desperately tried to avoid trial by a virtual blizzard of procedural and substantive arguments (JA 1-9).

Milwaukee moved to dismiss for lack of *in personam* jurisdiction and improper venue.

Coupled with this motion was the claim that Milwaukee should be permitted to discharge raw sewage because the discharge of raw sewage had been an accepted practice in the United States for 200 years.

Milwaukee also asked that the complaint be dismissed and that Illinois be required to take its complaint to the Great Lakes Basin Commission.

With the passage of the 1972 amendments to the Federal Water Pollution Control Act, Milwaukee moved to dismiss the complaint on the ground that the 1972 amendments preempted the federal common law of nuisance.

In May 1976, after a trial date had been set, Milwaukee moved: a) to declare the action a class action with all polluters of Lake Michigan as a class; b) to join all pollution sources of Lake Michigan; and c) to declare the case a complex case and postpone the trial.

Again in May 1976 Milwaukee filed another motion to dismiss arguing that the permits issued by Wisconsin pursuant to the 1972 FWPCA amendments preempted this action.

In July 1976, Milwaukee again filed a motion to postpone trial date.

In late 1976, shortly before the scheduled trial date, Milwaukee filed a mandamus petition with the United States Court of Appeals asking that the trial be postponed.

Milwaukee's approach to these procedural arguments is illustrated by a pre-trial memorandum written by Milwaukee trial counsel during late 1976, when trial was rapidly approaching:

> "It is important to stress at the outset that the practical chance of obtaining any form of pretrial appellate relief *even simply in terms of additional trial delay is extremely slim.* Nonetheless, if we can afford to devote the necessary manpower, an aggressive appellate program *combined with a further motion program before the District Court may spread more thinly the time our opposition lawyers can devote to trial preparation and wear down their energies in this matter a bit.*"
>
> (Ill. App. 104a) (emphasis added)

* * *

> There is also no discussion here of the *possibility of drafting up a raft load of third-party complaints* and seeking leave of the District Court pursuant to Rule 14, Federal Rules of Civil Procedure, for *service of same upon other polluters of the lake and of the Milwaukee River.*
>
> (Ill.App. 113a) (emphasis added)

* * *

> . . . If it is felt we can spare the time, it would appear that an *aggressive pretrial mandamus and appellate program* would at least have the *positive effect of forcing our opposition to fight the battle on many fronts* and thus, perhaps, *diluting their efforts a bit.* Certainly, it is hard to see what we would lose by such an approach.
>
> (Ill. App. 113a) (emphasis added)

Only when the mandamus petition and all of the other procedural maneuvers were finally put to rest was Milwaukee forced to trial.

3. The Evidence at Trial

As two courts have held after exhaustive reviews of the exhibits and testimony, the evidence of Milwaukee's pollution of Illinois waters of Lake Michigan was overwhelming. Both extensive test data and the testimony of scientists—including admissions by defendants' own witnesses—established the following points.

Milwaukee, through overflow devices in its separate sanitary sewer area and its Combined Sewer Area discharges enormous amounts of raw sewage into Lake Michigan. Additionally, defendants' overloaded treatment plants also discharge huge quantities of improperly treated sewage into Lake Michigan (Pet. App. B-2—B-10). These raw and inadequately treated fecal wastes contain billions of pathogenic bacteria and viruses (Pet. App. B-8).

These fecal wastes—and the bacteria and pathogens within them—are periodically transported by prevailing shore-parallel currents into the Illinois waters of Lake Michigan. Defendants' own tests of current speeds, direction and persistence confirm this fact, and defendants have admitted that Milwaukee's pollution discharges reach Illinois waters (Pet. App. B-10—B-17).

Defendants' own tests as well as their experts' own admissions establish that low dilution of these substances occurs and that hazardous concentration of these pathogens still remain when they reach Illinois waters (Pet. App. B-18—B-19).

Contrary to Milwaukee's claims, there is direct evidence of fecal contamination at Illinois beaches directly south of the Wisconsin line (Pl. Ex. 172, 173; Pet. App. B-19—B-22).

Contrary to Milwaukee's claims, there is direct evidence of enteric diseases being suffered by Illinois citizens; diseases which are necessarily caused by fecal-oral transmission (Df. Ex. 83; TR. 2217, 13228).

In addition to the public health concerns, Milwaukee sewage contains large amounts of phosphorus—a critical nutrient for the growth of plant life in Lake Michigan. From its treatment plants alone, Milwaukee discharges over one million pounds of phosphorus a year—50% of the sewage load of phosphorus discharged into all of Lake Michigan (TR. 12929). No one can estimate how much more phosphorus comes from the raw sewage overflows. Nutrients, particularly phosphorus, dramatically accelerate the eutrophication problems of the Lake. Communities along the entire lakeshore now experience taste and odor problems caused by algae in the water they get from Lake Michigan (TR. 13530). This increasing eutrophication also poses a hazard to fish spawning grounds (TR. 12727).

In response to Milwaukee's attempts to disparage the trial judge and to take out of context isolated portions of his findings, Illinois directs the Court to the following sources of evidentiary analysis: (1) the entire District Court findings of fact (Pet. App. F-1—F-30); (2) the incredibly detailed review of the evidence by the Court of Appeals. (Pet. App. A-26—A-40, B-1—B-32); (3) the Supplemental Memorandum of the State of Illinois filed pursuant to the Order of the Court of Appeals of May 26, 1978 (JA 118-196, 331-349).

4. The Judgment of the District Court on Liability

After hearing months of testimony and reviewing hundreds of exhibits, the District Court entered judgment on all counts of Illinois' complaint, finding that defendants' discharges constituted: (a) a federal common law nuisance; (b) a violation of

the Illinois Environmental Protection Act; and (c) a common law nuisance under Illinois state law. (Pet. App. F-24, *see also* Pet. App. F-2).

5. The Remedy Ordered by the District Court

Having found liability, the District Court entered a judgment order designed to abate the nuisance. The District Court's remedy with respect to the elimination of disease-causing organisms[8] was in two parts:

a. *Collection.* The District Court ordered that the raw sewage be collected for treatment instead of being discharged raw into Lake Michigan.

(i) *The Separated Sewer Area.* Approximately 95% of the 420 square mile sewer collection systems in Metropolitan Milwaukee is a so-called "separated" system. Only 5% of the area is served by combined sewers—the so-called "CSO" area. In the Separated Sewer system, the sanitary sewage by design is carried to the treatment plant for treatment and separate storm sewers carry off storm water from roofs, yards, and streets to public waters. In Milwaukee, the sanitary sewer collection system in this separated area has become severely overloaded.

Not the least cause of these hydraulic overloads was defendants' conscious practice of building larger diameter sewers in outlying areas which were connected to smaller diameter sewers leading to the treatment plant—resulting in more sewage flow than the pipe can handle (TR. 139-140, 333-334).

In the 1950's Milwaukee began to build overflow devices in the Separated Sewer Area to allow these increasing fecal

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[8] To abate the eutrophication nuisance, the District Court ordered an effluent limitation *less than* 1 mg/l phosphorus which would be "the inevitable consequence of the type of advanced treatment" being ordered to destroy disease bearing organisms (Pet. App. F-26).

loads into local streams and into Lake Michigan (TR. 131).[9] At the present time, Milwaukee (the City Sewerage Commission) maintains 50 of these overflow devices in the interceptor sewer system for the separated area (TR. 134), and the City of Milwaukee maintains 78 overflow devices in the separated area on the local sanitary collector sewers.

As to the Separated Sewer Area, the Judgment Order entered by the District Court and the permit requirements issued by the State of Wisconsin are identical to Illinois Requirements—*elimination* of the overflows (JA 358, 379, 416, 438; Ill. App. 57a, 79a).[10] The only real difference is that the state permit has no effective enforceable deadline, whereas the Judgment Order entered by the District Court has a specific deadline—1986.

(ii) *Combined Sewer Area (CSO).* As to the portions of the sewer area containing combined sewers (CSO), the Judgment Order provides that Milwaukee collect, store and treat the sewage from the CSO (JA 358-359). The District Court did *not* select or dictate the method or the time schedule for achieving collection of sewage (Pet. App. F-26). The evidence had established several alternatives for effective collection, including:

1. Sewer separation, e.g., taking the storm drainage—intentional or unintentional—out of the combined sewer and leaving an adequate sanitary sewer to carry the sewage to the plants.[11]

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[9] Contrary to Milwaukee's unsupported claim that overflows from such a system are largely "storm water runoff"; fecal coliform counts in the sewage discharged from Milwaukee's sewage system overflows have been recorded as high as 23 *million* per 100 milliliter (Pet. App. B-9). The effluent limit for supposedly safe levels of fecal coliform is 200 per 100 ml.

[10] Within the context of the Amended Judgment Order, "eliminate" means to treat the sewage to the level of secondary treatment (30/30) with disinfection.

[11] A generalization is often made that sewer separation is too expensive even though it is the surest way to provide environmental protection. Ironically, here Milwaukee studies have shown that separation compares favorably in cost to other systems.

2. Collection, Storage, Treatment (CST). Rather than separate the storm drainage from the sanitary waste, the design here is to collect the mixture of storm water and sewage, store it, and then gradually pump the stored wastes for treatment.

Milwaukee—not the District Court—then proceeded to select a collection, storage, and treatment (CST) system as the basis of collection. The Judgment Order of which Milwaukee now complains was prepared by Milwaukee lawyers and engineers (with plaintiffs' participation) and submitted to the District Court for approval on November 14, 1977. The Judgment Order expressly provides for modification if there is a lower cost, equally effective alternative (JA 360).

Milwaukee also selected the timetable for collection and correction of raw sewage CSO overflows. This timetable calls for a staged program of overflow correction which will be completed by 1989. Having negotiated the timetable with plaintiffs, having stipulated as to the feasibility of the timetable (Pet. App. E-2) and having submitted the timetable to the District Court, Milwaukee can hardly complain about the timetable. The Judgment Order's 1989 deadline should be compared to the open ended deadline in the Dane County stipulation which extends into the year 2020.

b. *Treatment.* The District Court then ordered that all of the raw sewage—once collected—be treated to destroy the disease-causing organisms in the sewage. The level of treatment ordered by the District Court is not at issue in Milwaukee's Petition. The appellate court reversed the District Court's treatment order on the extra-record and erroneous factual assumption that "secondary" treatment—established as *minimum* treatment by the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*—would destroy viruses. This assumption has no factual support in the record and indeed is contradicted by evidence in the record. Appellate courts cannot make factual conclusions which have not been the subject of evidentiary proof in the trial court and which cannot be judicially noticed. ***Borden Farm***

Products v. *Baldwin,* 239 U.S. 194, 208-209 (1934). The appellate court's action is the subject of Illinois' pending Petition for a Writ of Certiorari, No. 79-571.

6. The Decision of the Court of Appeals

The Court of Appeals conducted an intensive independent review of the facts and affirmed the District Court both as to liability and the remedy ordered for sewage collection. (Pet. App. A-1—A-48, B-1—B-32).

SUMMARY OF ARGUMENT

This case is hopefully the final stage in an incredible 13 year odyssey by the State of Illinois to abate the gross discharges of raw and improperly treated sewage by Milwaukee into the Illinois waters of Lake Michigan. However, the decision in this case will have major impacts far beyond the prevention of water pollution. The Court's decision in this case necessarily involves several major constitutional and statutory issues which affect all suits between a State and a citizen of another State.

A. Legal And Constitutional Framework For Illinois' Claims

This Court cannot properly evaluate the arguments raised by Milwaukee without a thorough examination of the subject matter jurisdiction, choice of law and supremacy questions created under the Constitution and Judicial Code when a State sues a citizen of another State. Directly involved in this case are the constitutional choice of law principles mandated by *Erie* v. *Tompkins, supra,* as articulated in the constitutional choice of forum analysis in *Ohio* v. *Wyandotte Chemicals Corp., supra.*

Though the subject of this suit is sewage contamination, the constitutional choice of law and choice of forum questions raised here apply to all suits by a State against a citizen of another State, whether the subject of the dispute is taxes, labor,

contracts or any of dozens of other disputes. Under Article III and the Judicial Code, the following constitutional mandates apply to this case:

1. Under the Constitution, a State cannot be compelled to bring its complaint against a citizen of another State in that citizen's state courts. *Wisconsin* v. *Pelican Insurance Co.,* 127 U.S. 265, 289 (1888); *Chisholm* v. *Georgia,* 2 Dall. 419 (1793); *Ohio* v. *Wyandotte Chemicals Corp., supra,* 401 U.S. at 500. Consequently, Illinois cannot be compelled to subject itself to the control of Wisconsin courts or agencies. Absent federal question jurisdiction, the only constitutionally permissible forum is either the Supreme Court or the courts of the complaining State.

2. Under the mandate of *Erie* v. *Tompkins,* in suits by a State against a citizen of another State, the law applied must be the law which is the source of the right asserted. If the right asserted has its source in federal law the court—be it state or federal—must apply federal law. Conversely, if the right asserted is based on state law the court—be it state or federal—must apply state law.

3. Interstitial federal common law—judge-made law intended to fulfill a Congressional purpose behind a statutory program—can only oust concurrent state law if Congress expressly intends such an ouster. Here, rather than evidence an intent to oust state law, Congress has expressed its desire that state statutory and common law be preserved. Consequently, Illinois' claims on state statutory and common law cannot be ousted by interstitial federal common law based on these same statutes.

4. In addition to declaring its express intent to preserve state statutory and common law, Congress has been expressly informed of this Court's decisions declaring interstitial federal common law, *e.g., Washington* v. *General Motors Corp., supra,* (post 1970 Amendments to the Clean Air Act); *Vermont* v. *New York, supra,* (post 1972 Amendments to the FWPCA). More-

over, Congress has been expressly informed of lower court decisions interpreting Congressional intent in the 1972 Amendments to the FWPCA as preserving the interstitial federal common law articulated by Justice Douglas.

5. The District Court properly held that federal law governed the federal common law count of Illinois' complaint and that state law governs the state statutory and state common law claims in Counts II and III. The District Judge's decision was mandated by the constitutional choice of law mandate set forth in *Erie,* the constitutional limits on judicial power to oust state law by the operation of interstitial federal common law, and the unequivocal intent of Congress to preserve state statutory and state common law remedies.

B. The Evidence To Support The Decision On Liability

Both the District Court and the appellate court found clear and convincing evidence of Milwaukee's liability (Pet. App. F-15, F-23, A-27). The appellate court's exhaustive analysis of the evidence is contained at pages B-2 and B-27 of the Petitioner's Appendix.

Given the detailed findings by the District Court, the detailed analysis of the testimony and evidence by the Court of Appeals, the "two-court" rule applied in *Berenyi* v. *District Director, Immigration & Naturalization Service,* 385 U.S. 630, 636 (1967) and *Graver Tank & Manufacturing Co.* v. *Linde Air Products,* 336 U.S. 271, 275 (1949), should be applied here.

This Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error". *Graver Tank & Manufacturing Co.* v. *Linde Air Products Co., supra,* 336 U.S. at 275.

C. Milwaukee's Arguments

1. *Compliance with Wisconsin abatement orders.* The District Court's order provides both specific substantive abatement obligations plus clear, reasonable deadlines for com-

pliance. In contrast, Wisconsin's abatement requirements continue the problems which have plagued Illinois since 1967: ill-defined, unenforceable substantive obligations and open-ended deadlines for compliance. Moreover, contrary to Milwaukee's arguments, the District Court's order is wholly consistent with the federal act requirements.

a. Separated Sewers. What Milwaukee does not tell the Court is that 95% of Milwaukee's sewers are separate sewers—not combined sewers—and that all the governmental agencies involved say that these separate sewers overflows should be eliminated and the sewage wastes conveyed to treatment. Unfortunately, Wisconsin has no enforceable deadline for such obligations.

b. Combined Sewers. As to combined sewers, all the governmental agencies involved and the statute say that such overflows must have water quality based effluent limitations under § 301(b)(1)(C), § 303(d), and § 303(c) of the Act which insure—with a "margin of safety"—that Lake Michigan water quality standards be achieved and not violated.

Wisconsin has failed to impose any effluent limitations on combined sewer overflows under § 303(d) and § 301(b)(1)(C) to achieve compliance with Lake Michigan water quality standards. Indeed, there are no effluent limitations at all on any of the combined sewer overflows imposed by Wisconsin. Moreover, any vague control that may be imposed need not be installed until the year 2025 or later.

Fortunately, Illinois cannot be barred from relief by Wisconsin's ill-defined open-ended abatement orders. The law is absolutely clear that compliance with a permit is not a defense to actions for common law nuisance. This doctrine is followed not only in Illinois and many other jurisdictions but is the explicit rule followed in Wisconsin.

2. *Cost-Effectiveness.* As to *combined* sewers, Milwaukee and the other sewage agencies want this Court to be their foil in a major game of legislative manipulation. Right now § 303(c)

and § 301(b)(1)(C) of the Act require all point sources to meet effluent limitations necessary to prevent violation of water quality standards. "Cost-effective" as used in the Act—§ 212—is clearly defined now in the EPA regulations as the least-cost way *to achieve* water quality based effluent limitations. (§ 301(b)(1)(C)). Violations of water quality standards are illegal.

Milwaukee wants this Court to reinterpret "cost-effective" to give this Court's permission to eliminate water quality standards violations which are not "cost-justified" or cost-effective as Milwaukee uses the term. Having failed to get Congress to weaken § 303(c) and § 301(b)(1)(C), Milwaukee wants this Court to fashion judicial legislation to overturn these statutory obligations.

3. *In personam jurisdiction.* A District Court's jurisdiction over the person of a nonresident defendant is dependent upon the extra-territorial service statute of the forum state. Fed. R. Civ. P. 4(e). In this case the Illinois "long arm" statute, Ill. Rev. Stat., ch. 110, §§ 16 and 17, control. Section 17, which lists the actions of a defendant by which it submits to the jurisdiction of an Illinois court, includes "[t]he commission of a tortious act within Illinois."

The Illinois Supreme Court has repeatedly held that the Illinois long arm statute reflects a conscious legislative purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause, and that Section 17 reaches nonresident defendants who commit acts in other states which result in injury in Illinois.

In the face of these unequivocal constructions of the Illinois statute by the highest court in the State—and the findings below that "[e]ach year defendants pump into Lake Michigan millions of gallons of pathogen-containing sewage, which the District Court found is sometimes carried into Illinois water and presents a substantial threat of harm to Illinois residents" (Pet.

App. A-5)—there is no basis whatsoever for Milwaukee's contentions that: 1) its discharge of raw sewage and disease-causing organisms into Illinois waters does not constitute commission of a tortious act in Illinois and; 2) its discharge of contaminants into Illinois waters does not constitute a sufficient "minimal contact" with Illinois to support *in personam* jurisdiction.

4. *Venue.* In this case, venue is governed by 28 U.S.C. § 1391(b), the general venue statute governing transitory actions in federal courts where jurisdiction does not depend on diversity of citizenship. Section 1391(b) permits suit in *either* the "judicial district where all defendants reside, or in which the claim arose. . . ." Under federal law there is no question but that Illinois' "claim arose" within the Northern District of Illinois, and venue was proper.

This Court should affirm the District Court, as affirmed by the Seventh Circuit Court of Appeals, with respect to the issues raised in Milwaukee's Petition.

ARGUMENT

I

UNDER THE CONSTITUTION ILLINOIS CANNOT BE COMPELLED TO LITIGATE ITS CLAIM AGAINST MILWAUKEE IN THE STATE COURTS OF WISCONSIN

A good deal of Milwaukee's confusion in this case lies in its disregard of the constitutional protections given the States when they joined the Union. Contrary to Milwaukee's argument, Illinois cannot be forced to litigate its claim in either Wisconsin state courts or Wisconsin state agencies. Under both the Constitution and the Judicial Code the only forums where an aggrieved State can be constitutionally compelled to litigate its claim against a citizen of another State are courts of the complaining State and Article III federal courts. Moreover, absent federal question jurisdiction under 28 U.S.C. § 1331 or some other specific grant of lower federal court jurisdiction, the only Article III federal court available is the Supreme Court.

A. This Is A Suit By A State Against A Citizen Of Another State

Article III, § 2, cl. 1 of the Constitution creates judicial power to decide controversies "between a State and Citizens of another State" and between "citizens of different States". Article III, § 2, cl. 2 confers original jurisdiction on the Supreme Court for cases in which a State is a party. Finally, the Judiciary Act of 1789, as currently reflected in the Judicial Code, states that the Supreme Court shall have *original but not exclusive* jurisdiction of all actions or proceedings by a State against the citizens of another State. 28 U.S.C. § 1251(b)(3).

As to suits between citizens of different States, the Judiciary Act of 1789—as currently reflected in the Judicial Code—states that the federal district courts shall have original jurisdiction of all civil actions between citizens of different States. 28 U.S.C. § 1332.

The overall reason for both jurisdictional grants was the same—to prevent prejudice to litigants from presumably biased local courts. "Without doubt the underlying considerations were akin to those which prompted the diversity clause . . ." *Hart & Weschsler, The Federal Courts and the Federal System* 18 (2d Ed. 1973). However, in actual implementation, the Judiciary Act of 1789 treated the two constitutional grants differently in allocating subject matter jurisdiction.

There are two reasons for the differences in the jurisdictional grants. First, absent a federal question, the only federal forum for a suit by a State against a citizen of another State is the Supreme Court. The prestige and dignity of a suing State was deemed entitled to invoke a federal forum of equal prestige. *The Federalist No. 81* (A. Hamilton) 548 (Cooke Ed. 1961). Consequently there was no need to provide a lower federal tribunal. Second, subject matter jurisdiction of a complaint by a State against a citizen of another State was not granted *exclusively* to the federal Supreme Court because the framers of the Constitution clearly anticipated an aggrieved State suing a citizen of another State in the complaining State's courts. *Plaquemines Tropical Fruit Co.* v. *Henderson,* 170 U.S. 511 (1898); *Germania Insurance Co.* v. *Wisconsin,* 119 U.S. 473, 475 (1886).

One of the key elements of this constitutional allocation of judicial power was that the complaining State could not be compelled to have its complaints tried in the State courts of the nonresident defendant. *Wisconsin* v. *Pelican Insurance Co.,* 127 U.S. 265, 289 (1888); *Chisholm* v. *Georgia,* 2 Dall. 419, 475-476 (1793). Justice Harlan restated this principle in *Ohio* v. *Wyandotte, supra:*

> "Two principles seem primarily to have underlain conferring upon this court original jurisdiction over cases and controversies between a State and citizens of another State or country. The first was the belief that *no State should be compelled to resort to the tribunals of other States*

for redress since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own. Chisholm v. *Georgia,* 2 Dall. 419, 475-476 (1793); *Wisconsin* v. *Pelican Ins. Co.,* 127 U.S. at 289."

401 U.S. at 500 (emphasis added)

Applying these principles to this dispute between Illinois and a citizen of Wisconsin, the Constitution is absolutely clear that neither the federal Judiciary nor Congress can compel Illinois to adjudicate its claims in the state courts of Wisconsin. *A fortiori,* Illinois cannot constitutionally be compelled to submit these claims to the administrative agencies of the State of Wisconsin.[12]

B. This Is Not A Suit By A State Against Another State

It is critical to emphasize that this Court has expressly held that this is *not* a suit between a State and another State. *Illinois* v. *Milwaukee, supra,* 406 U.S. at 98. This distinction—between a suit by one state sovereign against another state sovereign (with exclusive original jurisdiction in the Supreme Court) as distinguished from a suit by a State against a citizen of another State (with alternative jurisdiction in the Supreme Court or the plaintiff State's courts) has major significance in the constitutional rules governing choice of law (see discussion, *infra*).

C. This Court's Dilemma Really Centers On The Search For An Alternative Forum

In both *Ohio* v. *Wyandotte* and *Illinois* v. *Milwaukee,* the main focus of this Court's concern was the need to find an alternative forum. As Justice Harlan made clear in *Ohio* v. *Wyandotte,* there are literally hordes of cases where States and citizens of other States come into conflict, including disputes over "taxes, motor vehicles, decedents' estates, business torts, government contracts, and so forth." 401 U.S. at 497.

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[12] Indeed, *sub silentio* the Court's 1972 decision in this case rejected Milwaukee's argument that Wisconsin state courts and Wisconsin administrative agencies could determine this controversy.

He then went on to observe that there were two reasons why, under the constitutional framework, disputes between a State and a citizen of another State had to come before the Supreme Court:

> "The first was the belief that no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own. *Chisholm* v. *Georgia,* 2 Dall. 419, 475-476 (1793); *Wisconsin* v. *Pelican Ins. Co.,* 127 U.S., at 289. The second was that a State, needing an alternative forum, of necessity had to resort to this Court in order to obtain a tribunal competent *to exercise jurisdiction over the acts of nonresidents of the aggrieved State.*"
>
> *Id.* at 500 (emphasis added)

It is this second *in personam* jurisdiction limitation which was driving cases to the Supreme Court. The Constitution had been drafted when the physical power principles of *Pennoyer* v. *Neff,* 95 U.S. 714 (1878), dominated concepts of *in personam* jurisdiction. But as Justice Harlan noted, just as there had been growth in the multitude of disputes between States and citizens of other States, concepts of *in personam* jurisdiction had expanded to permit complaining States to sue in their own courts. 401 U.S. at 497, 500.

It was this finding of the alternative forum which allowed the Court to avoid the burden of an original action in the Supreme Court while still fulfilling its constitutional duty under Article III:

> "Thus, at this stage we go no further than to hold that, as a general matter, we may decline to entertain a complaint brought by a State against the citizens of another State or country only where we can say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant."
>
> *Id.* at 499

Illinois believes that this Court's approach in *Wyandotte* was correct. Given the thousands of disputes arising between States and citizens of other States over a huge range of substantive matters, the Court has the following options:

1. It can hear the cases by means of a master. This the Court is constitutionally obliged to do if there is no constitutionally acceptable alternative forum.

2. It can reaffirm the *in personam* principles set forth in *Ohio* v. *Wyandotte.* This would leave the bulk of the actions in the state courts where they can be properly resolved without burdening this Court.

3. It can continue to fashion substantive interstitial federal common law rights, as in *Illinois* v. *Milwaukee,* in order to find an alternative lower court federal forum.

II.

CHOICE OF LAW—UNDER THE CONSTITUTION THE LAW TO BE APPLIED IN DETERMINING CLAIMS OF SUBSTANTIVE RIGHT IS THE LAW WHICH IS THE SOURCE OF THE SUBSTANTIVE RIGHT

The substantive law to be applied to a claim is determined not by the forum the parties find themselves in—but by the source of the law. If the source of the law is state law, the court, be it federal or state, must under *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), apply state law. If the source of the law is federal, the court must apply federal law. Where, as here, the State has brought separate claims based on federal law and state law, federal law dictates the right to recover under the claim which has its source in federal law. However, state law dictates the right to recover on the state law claims in counts II and III.

This mandate is found in both the basic concepts of federalism and the constitutional limitations on the power of federal courts to make their own law as embodied *Erie R. Co.*

v. *Tompkins* and the Rules of Decision Act, 28 U.S.C. § 1652. *See Guaranty Trust Co.* v. *York,* 326 U.S. 99, 112 (1945).

This statutory and constitutional mandate has repeatedly been recognized by courts and commentators:

> "... there are several reasons for applying state law in original suits by a state against a citizen of another state. Although a state has been held "not to be a citizen of itself" for purposes of diversity jurisdiction in the federal trial courts, *the situation is analogous to ordinary diversity suits.* This analogy supports the application of section 1652 of the Judicial Code, the statute construed in the *Erie* case, and the application of this statute would also avoid the constitutional problems suggested by the *Erie* decision.
>
> The policy grounds for the *Erie* doctrine would also seem to apply to suits between a state and citizens of a sister state under the original jurisdiction. *Since these suits may also be brought in a state court,* the Supreme Court would be promoting uniformity and limiting "forum shopping" as between the state courts and the Supreme Court if *Erie* were applied."[13]
>
> Note, *The Original Jurisdiction of the United States Supreme Court,* 11 Stan. L.Rev. 665, 684-85 (1959) (emphasis added)

Justice Harlan applied the *Erie* mandate in *Ohio* v. *Wyandotte* and stated that *Erie* would require the application of state law to Ohio's claim based on Ohio nuisance law even if there were subject matter jurisdiction in the federal district court. 401 U.S. at 498 n.3.

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[13] Technically the statement that "state" law should apply is in error. While it is correct that *Erie* would apply to such suits, the *Erie* rule requires application of the law which is the source of the right asserted. Thus where the State is seeking to enforce a right based on federal law, federal law governs. Where the source of the right is state law, state law governs. *See, Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.,* 234 F.2d 538, 540-41 & n.1 (2d Cir. 1956).

III

JUDICIAL DECLARATION OF A FEDERAL COMMON LAW RIGHT AS AN INTERSTITIAL REMEDY TO EFFECTUATE A CONGRESSIONAL PURPOSE CANNOT OUST STATE LEGISLATURES AND COURTS OF THEIR LAW-MAKING POWER UNLESS CONGRESS CLEARLY INTENDS STATE LAW TO BE OUSTED

Federal courts have a necessary constitutional function to effectuate the congressional purpose reflected in statutes by providing interstitial remedies which are characterized as "*federal*" common law. However, the federal courts' power to preempt or oust state law from concurrently addressing the same problem area is only as extensive as the congressional intent to oust state law. Where Congress has expressly and repeatedly stated its desire to preserve state statutory and common law remedies, federal courts cannot—in the guise of creating interstitial federal common law and under the authority of those same congressional enactments—judicially oust state statutory and common law.

A. The Source of the Federal Common Law of Nuisance Articulated by This Court Was "Interstitial" Federal Common Law

One of the key inquiries here is the source of the federal common law articulated by Justice Douglas in *Illinois* v. *Milwaukee*. Clearly the Court was creating what has been called "interstitial" federal common law. As explained by Professor Mishkin:

> "At the very least, effective Constitutionalism *requires recognition of power in the federal courts to declare, as a matter of common law or "judicial legislation,"* rules which may be necessary to fill in *interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress.* In other words, it must mean recognition of federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation."

> Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision,* 105 U. Pa. L. Rev. 797, 800 (1957) (emphasis added)

There are numerous examples of this Court's exercise of such interstitial power by declaring a federal remedy or right. Where Congress had failed to specifically address the particular problem before the Court, the Court fashioned a judge-made remedy to effectuate a perceived congressional purpose. *Board of Commissioners of Jackson County* v. *United States,* 308 U.S. 343 (1939); *Deitrick* v. *Greaney,* 309 U.S. 190 (1940); *D'Oench, Duhme & Co.* v. *FDIC,* 315 U.S. 447 (1942); *Clearfield Trust Co.* v. *United States,* 318 U.S. 363 (1943).

Perhaps the broadest assertion of such interstitial power was in *Textile Workers Union of America* v. *Lincoln Mills,* 353 U.S. 448 (1957). *Lincoln Mills* and the authority upon which it rests are based on express determinations by the Supreme Court that development of such *federal* common law remedies was contemplated by Congress as an interstitial remedy as part of its legislative grant of authority. 353 U.S. at 455.

In *Illinois* v. *Milwaukee,* Justice Douglas followed the same pattern in finding an interstitial federal common law based on the then existing federal statutes dealing with water quality. He began by citing the broad range of federal statutes dealing with interstate waters. 406 U.S. at 101-02. He then turned to the delineation of the federal common law remedy within this multitude of federal statutes, including the Federal Water Pollution Control Act:

> "The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only *federal* remedies available."
>
> 406 U.S. at 103 (emphasis added)

Justice Douglas then cited as authority this Court's decision in *Lincoln Mills:*

> "It is not uncommon for federal courts to fashion federal law where federal rights are concerned. *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 457."
>
> *Id.*

Thus the Court was clearly basing its articulation of federal common law on the same kind of interstitial common law development based on a statutory scheme which had been used in *Board of Commissioners, supra, Dietrick, supra,* and *D'Oench, supra.*

B. Federal Interstitial Common Law Cannot Oust Concurrent State Statutory and State Common Law Unless the Statutory Scheme on Which the Interstitial Federal Common Law is Based Demonstrates A Clear Intent To Oust State Law.

While *Board of Commissioners, D'Oench, Deitrick* and similar decisions clearly establish the principle that federal courts can establish an interstitial federal common law and hold that federal, not state, law determines the extent of the federal right—such cases do not deal with the question of whether interstitial federal law preempts (i.e. ousts) concurrent state statutory and common law from protecting state law rights. The only cases dealing with ouster of state law by federal common law have found express evidence of congressional intent to oust concurrent state activity.

In *Local 174, Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95 (1962), the Court did hold that the federal common law announced in *Lincoln Mills* preempted state law, but only after finding that it would be impossible for the two schemes to co-exist. The Court therefore concluded that *Congress* must have intended to preempt local law:

> "[W]e cannot but conclude that in enacting § 301 *Congress intended* doctrines of federal labor law uniformly to prevail over inconsistent local rules."
>
> 369 U.S. at 104 (emphasis added)

In a related area this Court has emphasized that the question of ouster of state statute and common law is a question best left to Congress and not the courts. *Miree* v. *DeKalb County, Georgia,* 433 U.S. 25, 32 (1977); *Wallis* v. *Pan American Petroleum Corp.,* 384 U.S. 63, 68 (1966).

Professor Paul Mishkin, a long time advocate of federal judicial power to formulate interstitial federal common law, has voiced constitutional concerns about judicial ouster of state law without express congressional intent:

> "I maintain that the Constitution bears not only on congressional power but also imposes a distinctive, independently significant limit on the authority of the federal courts to displace state law.
>
> * * *
>
> That Congress may have constitutional power to make federal law displacing state substantive policy does *not* imply an equal range of power for federal judges. Principles related to the separation of powers impose an additional limit on the authority of federal courts to engage in lawmaking on their own (unauthorized by Congress)."
>
> Mishkin, *Some Further Last Words on Erie—The Thread,* 87 Harv. L.Rev. 1682, 1683 (1974) (emphasis in original)

C. The Constitutional Mandate Of *Erie* That State Law Govern The Determination Of Rights With Their Source in State Law Is Consistent With The Court's Decision In *Illinois* v. *Milwaukee*

Footnote 5 of Justice Douglas' opinion in *Illinois* v. *Milwaukee* cites a lengthy passage from *Lincoln Mills* that many argue reflects a preemption of state law. 406 U.S. at 103 n.5. But *Lincoln Mills* and other interstitial federal common law cases did not address preemption of state law and are readily reconciled with the *Erie* mandate followed in *Ohio* v. *Wyandotte.*

In *Lincoln Mills* the Court, first having found that the source of the substantive right being asserted had its basis in federal law (i.e., the congressional purpose to provide substan-

tive legal remedies), then held that "*Federal* interpretation of the *federal law* will govern, *not state law.*" 353 U.S. at 457 (emphasis added).

This basic rule—that federal law, not state law, governs the interpretation of rights to relief based on substantive federal law—is dictated by the Supremacy Clause of the Constitution. However, the constitutional converse is also true. The scope and meaning of rights based on state substantive law must be based on state law—not some federal "common" law. This was the basic holding of *Erie* v. *Tompkins* in 1938 and the counterpart decision of this Court in 1939 in *Board of Commissioners of Jackson County* v. *United States,* 308 U.S. 343 (1939).

Board of Commissioners was decided soon after *Erie* and illustrates the distinction very well. There the Court undertook a multi-step analysis. The Court first determined that the right being asserted had its basis in federal law. 308 U.S. at 349. The Court then determined that Congress had neglected to provide a remedy for that right and had left the remedy to judicial implication. *Id.* The Court then applied the corollary of *Erie's* constitutional mandate: "Since the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties or statutes of the United States, *and does not owe its authority to the law-making agencies of Kansas. Cf. Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487." *Id.* at 349-50 (emphasis added).

Having decided that the rule of decision was federal law, the Court went on to emphasize that nothing in state law could be used to defeat that federal right. *Id.* at 350. This holding was totally consistent with the Supremacy Clause. However in the interests of federal/state comity, the Court held that the local law on payment of interest would be "absorbed" into the federal law.

> "With reference to other federal rights, the state law has been *absorbed,* as it were, as the governing federal rule *not*

> *because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy."*
>
> *Id.* at 351-52

The case that clarifies the distinction between choice of law where the right asserted has its source in federal law and choice of law when the right asserted has its source in state law is *Guaranty Trust Co.* v. *York,* 326 U.S. 99 (1945):

> "We put to one side the considerations relevant in disposing of questions that arise *when a federal court is adjudicating a claim based on a federal law.* See, for instance, *Board of Com'rs* v. *United States,* 308 U.S. 343, 60 S.Ct. 285, 84 L.Ed. 313; *Deitrick* v. *Greaney,* 309 U.S. 190, 60 S.Ct. 480, 84 L.Ed. 694; *D'Oench, Duhme & Co.* v. *F.D.I.C.,* 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956; *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838; *O'Brien* v. *Western Union Telegraph Co.,* 1 Cir., 113 F.2d 539. Our problem only *touches transactions for which rights and obligations are created by one of the States,* and for the assertion of which, in case of diversity of the citizenship of the parties, Congress has made a federal court another available forum."
>
> 326 U.S. at 101 (emphasis added)

Against this background, Justice Douglas' footnote 5 at 406 U.S. at 103 takes on its appropriate meaning. Justice Douglas had found his source of federal right and federal concern in the panoply of federal statutes which impacted water pollution control. 406 U.S. at 101-02. However, since the federal laws in this area did not give the specific remedy sought by Illinois, Justice Douglas created a federal "common law" remedy which filled in the interstices left by the federal statutes in the area. *See Board of Commissioners, supra; Deitrick, supra; D'Oench, supra.*

Since the source of the federal remedial right created as an interstitial remedy was based on the federal statutes, federal not state law must govern the interpretation of that right. *Board of*

Commissioners, supra. For the purpose of determining the outlines of that judge-made federal common law, state law could be absorbed but was not binding on the determination of that federal common law right.

Footnote 5 of *Illinois* v. *Milwaukee* does not discuss the law to be applied where as here, claims based on state law are also presented. The complimentary doctrine of *Erie* and *Board of Commissioners* provide a clear rationale for applying federal principles and "absorbed" state law to the articulation of the federal right, and for applying state law for decision of the state right under *Erie, Guaranty Trust* and *Ohio* v. *Wyandotte.*

D. The Law Applied In Suits By One State Against Another State Does Not Apply To Interstitial Federal Common Law.

In suits between sovereigns, state law is completely ousted and federal law must govern. *See, e.g., Kansas* v. *Colorado,* 206 U.S. 46 (1907); *Connecticut* v. *Massachusetts,* 282 U.S. 660 (1931). Illinois is in complete agreement with that principle and it is totally consistent with the special exclusive jurisdiction of the Supreme Court over direct suits between sovereigns. Just as state courts could not intrude upon the Supreme Court's original and exclusive jurisdiction so also the state law of any State cannot be imposed on the sovereign actions of another State. Here by definition the only choice of law is federal.

The principles of common law announced in these cases did not oust or preempt state law. Instead, by the constitutional definition of a dispute between sovereign States, state law was *constitutionally* preempted.

This automatic constitutional preemption of all state law in disputes directly between States would apply to all state law. Thus if the disputes were over taxes, contracts, torts, labor agreements or any other substantive subject matter, the Constitution dictates that in disputes directly between the sovereign States, the Supreme Court fashion federal law and no state law can constitutionally apply.

This specialized and essential constitutional ouster of state law in direct disputes between sovereigns is wholly consistent with *Erie* v. *Tompkins* and *Ohio* v. *Wyandotte*. Since the Constitution says federal law must govern to the exclusion of state law in direct disputes between sovereigns, it was wholly consistent for the author of *Erie* to also indicate the same day in *dicta* that federal common law governed disputes between the States. *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

But that constitutional ouster has no meaning in suits between citizens of different States or between a State and a citizen of another State. Under those circumstances, *Erie* and *Ohio* v. *Wyandotte* mandate that the court—be it state or federal—apply the law which is the source of the substantive right being asserted.

E. Congress Has Not Preempted State Statutory And Common Law Remedies To Abate Water Pollution

The only remaining question is whether Congress expressed any intent to oust state law. If Congress intended to preserve state law, federal interstitial common law—based as it must be on congressional purpose—cannot constitutionally oust state law.

1. The Law of Preemption

At the heart of the preemption of state law issue are the basic principles of federalism calling for the sharing of power between the States and the national government:

> "... we start with the assumption that the historic police powers of the states will not be superseded by the Federal Act unless that is the clear and manifest purpose of Congress."
>
> *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)

The common sense constitutional roots of this careful diffusion of power have been described best by Professor Henry Hart:

> "We could have, in principle, a perfect uniformity of law in the United States—at a price. We could have it by establishing a single legislature, a single system of courts, a single chief executive, and a single phalanx of executive departments and administrative agencies, each possessing within its sphere a nation-wide and general jurisdiction.
>
> So Procrustean a solution of the problems of federalism is unlikely to find wide favor. . . . Common sense and the instinct for freedom alike can be counted upon to tell the American people never to put all their eggs of hope from governmental problem-solving in one governmental basket."
>
> Hart, *The Relations Between State and Federal Law,* 54 Colum. L. Rev. 489, 539-540 (1954)

The intent of Congress to preempt state law must be clear. ". . .[W]e are not to conclude that Congress legislated the ouster of this California statute by the marketing orders in the absence of an unambiguous congressional mandate to that effect. We search in vain for such a mandate." *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 147 (1963). Absent such unambiguous intent the Court should not find preemption of state law. *New York State Department of Social Services* v. *Dublino,* 413 U.S. 405, 415 (1973).

2. Congressional Intent to Preserve State Law

Both the express language and the legislative history of the Federal Water Pollution Act Amendments of 1972 and 1977 show unmistakable congressional intent to preserve state law remedies.

Milwaukee has ignored Section 510 of the 1972 Amendments, which expressly allows a State or political subdivision to impose more stringent requirements:

> "*State authority*—Except as expressly provided in this Act, *nothing* in this Act *shall* (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) *any standard or limitation*

respecting discharges of pollutants, or (b) *any requirement respecting control or abatement of pollution. . .*"

33 U.S.C. § 1370 (emphasis added)

With respect to this section, the House Public Works Committee stated:

> "The Committee considers section 510 to be of extreme importance in assuring the States of the right to adopt or enforce provisions at least as strict as those established in this legislation. Thus, *the Committee rejected in most instances suggestions for preemption by the Federal Government* and preempted the States only where the situation warranted it based upon the urgent need for uniformity such as in section 312(f) relating to marine sanitation devices."
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> 1 Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972,* 93d Cong. 1st Sess. 823 (1973) (hereinafter cited as "Legislative History") (emphasis added)

Since the passage of the 1972 Amendments, the courts have uniformly recognized the rights of States to require more stringent requirements than the national standards.[14] Nor did Congress in any way seek to restrict this right to more stringent standards in the 1977 Amendments. In the Senate Report on the 1977 Amendments, the Senate Public Works Committee states:

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[14] *United States Steel Corp.* v. *Train,* 556 F.2d 822, 839 (7th Cir. 1977); *Mianus River Preservation Comm.* v. *E.P.A.,* 541 F.2d 899, 906 (2d Cir. 1976); *Metropolitan Sanitary District* v. *United States Steel Corp.,* 30 Ill. App. 3d 360, 332 N.E.2d 426, 434 (1975), *cert. denied,* 424 U.S. 976 (1976); *People ex rel. Scott* v. *United States Steel Corp.,* 40 Ill. App. 3d 607, 352 N.E.2d 225, 229 (1976); *United States ex rel. Scott* v. *United States Steel Corp.,* 356 F.Supp. 556, 558-59 (N.D. Ill. 1973); *Illinois* v. *City of Milwaukee,* 366 F.Supp. 298 (N.D. Ill. 1973); *Cf. Village of Glencoe* v. *Metropolitan Sanitary District,* 23 Ill. App. 3d 868, 320 N.E.2d 524 (1974).

> "There is nothing in these new provisions which in any way preempts the rights of States to have more stringent water quality standards or associated effluent limitations; . . ."
>
> S. Rep. No. 370, 95th Cong. 1st Sess. 43 (1977) 4 *Legislative History,* 676

Just as States were entitled to require more stringent discharge requirements under the Act, so also their various pre-existing common law and statutory remedies were preserved. Section 505 creates a specific statutory cause of action for any citizen to enforce any effluent limits imposed by the Act. By its express terms the cause of action created by Section 505 is limited to enforcing the specific limits set under the FWPCA. Section 505 does not create any right to enforce obligations which are not in the Act and common law nuisance claims are not § 505 actions. *Stream Pollution Control Board* v. *United States Steel Corp.,* 512 F.2d 1036, 1041 (7th Cir. 1975).

Congress clearly stated that Section 505 did not bar any other action which might exist under state common law or statute. Section 505(e) of the 1972 Amendments states:

> "(e) *Nothing* in this section *shall restrict any right* which any person (or class of persons) may have *under any statute or common law* to seek enforcement of any effluent standard or limitation or *to seek any other relief* (including relief against the Administrator or a State agency)."
>
> 33 U.S.C. § 1365(e)

The House Report on the 1972 Amendments states:

> "Subsection (e) provides that the right of persons (or class of persons) to seek enforcement or other relief under any statute or common law is not affected."
>
> 1 *Legis. Hist.* 821

F. Congress Was Aware Of Court Decisions That The 1972 FWPCA Amendments Had Not Preempted *Federal* Common Law. With This Knowledge It Rejected Attempts To Preempt Both The Federal Common Law And The Result In This Case

Given the clear intent of Congress that state statutory and common law remedies be preserved, the Court need not reach the question of the continued survival of a *federal* common law remedy which would fill in the interstices of the federal Act as now constituted. Nevertheless, the continued existence of a "*federal*" common law nuisance power is extremely necessary and useful. It is this federal common law nuisance authority which fills the gaps that Congress did not forsee or the agency could not address. For these reasons, and not as necessary to the determination of this case, the Court should declare the continuing vitality of federal common law power.

An examination of the legislative history of the 1972 and 1977 Amendments clearly establishes that Congress has not preempted "federal" common law. Congress had a detailed analysis of the federal common law of nuisance and the lower court cases applying it when it adopted the 1977 amendments, P.L. 95-217. By 1977, several cases, including a reported decision in this case (366 F.Supp. 298; Pet. App. G-1 *et seq.*) had considered and rejected the argument that the 1972 amendments preempted *federal* common law claims. *See e.g., Board of Supervisors of Fairfax County, Virginia* v. *United States,* 408 F.Supp. 556, 562 (E.D. Va. 1976); *United States* v. *Ira S. Bushey & Sons, Inc.,* 346 F.Supp. 145, 149 (D. Vt. 1972); *United States ex rel. Scott* v. *United States Steel,* 356 F.Supp. 556, 559 (N.D. Ill. 1973); *United States* v. *Ira S. Bushey & Sons, Inc.,* 363 F.Supp. 110, 120 (D. Vt.), *aff'd,* 487 F.2d 1393 (2d Cir. 1973), *cert. denied.,* 417 U.S. 976 (1974).

Congress knew that these cases had construed the 1972 amendments as preserving a *federal* common law of nuisance. While Congress was considering the 1977 amendments, the Congressional Research Service of the Library of Congress compiled the significant decisions which had construed the 1972 Act during the preceding five years.[15] The Library of Congress Report contains repeated, specific discussions of this very case:

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[15] House Comm. on Public Works and Transportation, *Case Law Under the Federal Water Pollution Control Act Amendments of 1972,* 95th Cong., 1st Sess. (Comm. Print 1977) (hereafter *"Library of Congress Report"*).

> "...[A] federal district court in Illinios [sic] held that the Act *does not preempt* a State action in federal court based on *federal* common law and seeking abatement of a nuisance. *Illinois* v. *City of Milwaukee,* 366 F.Supp. 298 (N.D.Ill. 1973)."
>
> *Library of Congress Report* at 3 (emphasis added)

In discussing cases which had construed Section 505 there was an entire section addressed solely to *federal* common law nuisance actions. *Library of Congress Report* at 106-07.

Finally, in the discussion of case law under Section 510 and its preservation of state authority, the Congressional Research Service again referred to this case, and explained to Congress in plain, unequivocal terms that the lower courts had construed the 1972 amendments as preserving *federal* common law:

> "In *Illinois* v. *City of Milwaukee,* 366 F.Supp. 298 (N.D.Ill. 1973), *the court held that neither the Act nor the E. P. A. regulations governing waste discharges and water quality barred a suit by the State of Illinois seeking to enjoin as a nuisance a Wisconsin city's alleged discharge of raw sewage into Lake Michigan.* The court relied in part on Section 510 in finding that the Act was not intended to terminate a state's right to invoke the federal common law of nuisance. *Accord United States* v. *United States Steel,* 356 F.Supp. 556 (N. D. Ill. 1973) (both the Federal Government and the State of Illinois may rely on federal common law of nuisance.) *See E. P. A.* v. *California,* 426 U.S. 200 (1976), discussed under Section 505."
>
> *Library of Congress Report* at 123 (emphasis added)

Contrary to Milwaukee's unsupported assertion that Congress passed two major statutes in a state of blissful ignorance, the legislative history is clear that Congress knew exactly what it was doing, meant exactly what it said, and fully intended to

preserve the common law, including the *federal* common law. It kept Sections 505(e) and 510 unchanged in the 1977 amendments.[16]

IV

THE DISTRICT COURT PROPERLY HELD THAT FEDERAL LAW GOVERNS THE FEDERAL COMMON LAW CLAIM IN COUNT I AND THAT STATE LAW GOVERNS THE STATE STATUTORY AND STATE COMMON LAW CLAIMS IN COUNTS II AND III.

The complaint in this case has three separate counts: a) Count I charged Milwaukee with the creation of a federal common law nuisance; b) Count II charged Milwaukee with violation of statutory prohibitions against water pollution contained in the Illinois Environmental Protection Act, Ill. Rev. Stat., ch. 111½ § 1001 *et seq.;* and c) Count III charged Milwaukee with the creation of a common law nuisance under

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[16] Further, in 1977 Wisconsin Congressman Les Aspin made a last-ditch attempt to overturn this very case and these constructions of the 1972 amendments and to severely limit the availability of all common law nuisance actions. Following the decision in the District Court in this case, but before the entry of judgment, Representative Aspin attempted to introduce an amendment to the bill which became the 1977 amendments. This amendment is reproduced in full in a separate Appendix, as are letters from Senator Stevenson and the Department of Justice expressing opposition to the Aspin amendment [Ill.App. 98a-103a]. The Aspin amendment would have amended Section 402—the Section dealing with discharge permits under the Act—and prevented a State and its citizens from bringing a common law nuisance action unless the State first participated in the administrative permit process. It would have applied even to pending cases unless a "final decision" had been rendered.

As Senator Stevenson's letter to Senator Randolph pointed out, the Aspin amendment—with its "final decision" language—was plainly directed at the District Court decision against Milwaukee in this case: it came in October, 1977, *after* the court announced its decision (July, 1977) but *before* the entry of judgment (November, 1977). Significantly, Congress did not adopt it. Having failed in Congress, Milwaukee is now asking the Court to adopt a judicial version of the Aspin amendment.

Illinois law. The District Court found liability on all three counts. (Pet. App. F-24.) The analysis set forth above clearly demonstrates that the judiciary in declaring *interstitial* federal common law—grounded on fulfillment of a legislative purpose—has no constitutional power to oust concurrent state statutory and common law rights where Congress has so unequivocally stated its intent to preserve such state remedies.

Since there is no preemption of any state statutory or common law claims, *Erie* and *Guaranty Trust* mandate that state law determine the state law counts and that federal law determine the federal law count.

V

THE EVIDENCE BEFORE THE TRIAL COURT BELOW OVERWHELMINGLY DEMONSTRATES MILWAUKEE'S LIABILITY FOR CONTAMINATING ILLINOIS WATERS OF LAKE MICHIGAN UNDER THE FEDERAL COMMON LAW, THE STATE COMMON LAW AND THE ILLINOIS ENVIRONMENTAL PROTECTION ACT.

Milwaukee has taken snatches of the District Court's findings and concocted a series of evidentiary claims that have little relationship to reality. It is sufficient to note that each of Milwaukee's evidentiary arguments was exhaustively examined by the Court of Appeals and rejected. Both the District Court and the Court of Appeals found clear and convincing evidence of Milwaukee's liability (Pet. App. F-15; F-23; A-27).

Given the detailed findings by the District Court (Pet. App. F-1 to F-30), the detailed analysis of the testimony and evidence by the Court of Appeals (Pet. App. A-26 to A-39; B-1 to B-32), the "two-court" rule applied in *Berenyi* v. *District Director, Immigration & Naturalization Service,* 385 U.S. 630, 636 (1967) and *Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275 (1949) should be applied here. This Court "cannot undertake to review concurrent findings of

fact by two courts below in the absence of a very obvious and exceptional showing of error". *Graver Tank & Manufacturing Co.* v. *Linde Air Products Co., supra,* 336 U.S. at 275.

Milwaukee repeatedly cites *New York* v. *New Jersey,* 256 U.S. 296 (1921), and *Missouri* v. *Illinois,* 200 U.S. 496 (1906), as if the facts in those situations were identical to those in the instant case. But in each of those cases the plaintiff State was allowing its own dischargers to discharge equal or greater amounts of sewage into the same watercourse, contaminating the same water:

> "Where as here, the plaintiff has sovereign powers and *deliberately permits discharges similar to those of which it complains,* it not only offers a standard to which the defendant has the right to appeal, but *as some of those discharges are above the intake of St. Louis,* it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it that courts should not be curious to apportion the blame."
>
> *Missouri* v. *Illinois,* 200 U.S. 496, 522 (1906) (emphasis added)

In *New York* v. *New Jersey,* the complaining State allowed New York City to dump into the same waters seven times the volume of sewage (all untreated) as the proposed New Jersey discharge which was treated. 256 U.S. at 303. Here, by contrast, Illinois has either completed or has under construction programs which have already eliminated or will eliminate all uncollected and untreated sewage discharges to Lake Michigan.

VI

WISCONSIN'S ABATEMENT REQUIREMENTS CONTINUE TO BE PLAGUED BY LACK OF SPECIFIC COMMITMENTS AND LACK OF PRECISE DEADLINES.

A. Wisconsin's Pollution Control Requirements

From the time this controversy began thirteen years ago, the abatement requirements imposed on Milwaukee by Wisconsin state agencies have been characterized by vague unenforceable discharge limitations and indefinite open-ended deadlines. This problem was not solved by the passage of the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500).

The 1972 Amendments mandated nationwide "technology-based" minimum effluent limitations for all sources on a uniform basis across the country. To protect clean high quality waters like Lake Michigan from being degraded down to some common denominator based on the technology-based nation-wide minimum, the House insisted on the inclusion of § 303 of the Act—the adoption of ambient water quality standards and the development of more stringent effluent limitations to meet those water quality standards.

These water quality standards for high quality waters were to be translated into effluent limitations through the procedures established by § 303(d) which required the states to identify those waters where the technology-based effluent limitations of § 301(b)(1)(A) and § 301(b)(1)(B) "*are not stringent enough* to implement any water quality standards ..." § 303(d)(1)(A). Section 303(d)(1)(C) then required the states to set a more stringent "total maximum daily load of pollutants" allowed to be discharged which would insure attainment of the water quality standards with a "margin of safety." § 303(d)(1)(C). These total maximum daily loads were then allocated by means of a waste load allocation among the various discharge points which were to be incorporated into point source permits as effluent limitations under § 301(b)(1)(C). R. Zener, *Water Pollution Control, in Federal Environmental Law*, 719 (1974).

In the eight years since the passage of the 1972 Amendments, Wisconsin has failed to impose effluent limitations which will insure the achievement of the public health water quality

standards it has adopted for Lake Michigan.[17] Permits issued to Milwaukee by the State of Wisconsin since 1972 continue to lack specific enforceable requirements and contain open-ended deadlines with respect to both the separate sanitary sewer system overflows and combined sewer overflows.

Separate Sanitary Sewer System Overflows. In 1974, Milwaukee was given until December 31, 1975 to produce a "plan" for "the *elimination* of all discharge points noted above" (JA 379, 416, 426). The "plans" were never submitted and no deadline has ever been set for the elimination of these points. In 1977, a Stipulation signed between Wisconsin and Milwaukee contained strong and clear prefatory language[18] but the actual obligation is much weaker. The obligation is only to "correct" *wet* weather discharge—not *dry* weather discharges. Moreover, there is no commitment to eliminate the discharges or meet secondary treatment standards by any date (JA 470).

In 1978 Wisconsin issued other permits for these separated sewer overflows which expressly state that the 1977 stipulation is not a part of the permits. (Ill. App. 50a). These permits specifically mandated "elimination" of these overflows or treat-

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[17] Wisconsin has set a water quality standard for Lake Michigan which states that the water quality for Lake Michigan shall be suitable for recreational use and as a public water supply and that the following criteria shall apply to protect that use: 1) "[s]ubstances in concentrations which are toxic or *harmful to humans* shall not be present in amounts found *to be of public health significance* . . ." NR 102.02; 2) a bacteriological criterion is set as: "[t]he membrane filter fecal coliform count shall not exceed 200 per 100 ml as geometric mean nor exceed 400 per 100 ml in more than 10% of all samples during any month." NR. 102.02; 3) as to public water supply the Wisconsin standards state "concentrations of other constituents *must not be hazardous to health.*" NR 102.02. (emphasis added) (compiled in BNA *Environment Reporter, State Water Laws,* Vol. 2, pp. 951: 1002-03.)

[18] "WHEREAS, the Department alleges that under *dry* weather and *wet* weather conditions, bypassing and overflowing occur within the sewerage systems of the Commissions and such discharges must *either be eliminated or meet secondary treatment standards* by July 1, 1977."

(JA 463) (emphasis added)

ment to specific secondary effluent limits with a specific limit on bacteria. (Ill. App. 57a, 79a). However, the July 1, 1977 deadline set in the permit is wholly fictitious; the permit was issued in 1978. The pollution control work has not been done and there is no future enforceable deadline.

Combined Sewer Overflows. In its 1974 permit, the sole requirement for the CSO overflows was for Milwaukee to:

> "... *initiate* a program *leading* to the attainment of control of overflows from the City's combined sewer system ... *to assure attainment of all applicable Water Quality Standards.*"
>
> (JA 461) (emphasis added)

No effluent limitations of any kind have ever been established for these CSO overflows. There were no technology-based effluent limits imposed under § 301(b)(1)(A) or § 301(b)(1)(B) in the 8 years since the passage of the 1972 amendments. Nor have any water quality based effluent limitations ever been imposed to assure the attainment of all applicable water quality standards as required by § 303(d) and § 301(b)(1)(C).

The 1977 Stipulation (JA 461) is even weaker than the 1974 permit. The Stipulation contains an obligation to achieve "applicable water quality standards" by 1993. However, no effluent limitations are established and in the absence of federal funds, the Commission can delay completion indefinitely. The current estimate given by Milwaukee is completion after the year 2020.

In the 15 years since the passage of the 1965 Federal Water Pollution Control Act, the Wisconsin authorities have paid lip service to requiring the achievement of water quality standards without ever once imposing specific discharge

requirements on the CSO overflows.[19] Yet the violation of these water quality standards is rampant:

> "All in all, it is apparent that *pollution of the surface waters from human sources is tremendous.* Defendants' Draft Facilities Plan (Pl. Ex. 35, at 12). (emphasis added)
>
> * * *
>
> Failure to implement a solution to the problem will cause the continuation of sanitary sewage-related health hazards resulting from the introduction of untreated or inadequately treated sanitary sewage to the surface waters, . . ."

Id. at 279.

Milwaukee has represented to this Court that its pollution abatement program will achieve water quality standards—as required by § 301(b)(1)(C). Yet in a Facility Plan published in February 1980, Milwaukee's Consulting Engineer admitted its Combined Sewer Abatement project will continue to cause water quality standards violations for fecal coliform—the indicator organism for pathogenic bacteria. (Milwaukee Metropolitan Sewerage District, *Combined Sewer Facility Plan* (February, 1980) (hereafter "Facility Plan") p. 6B-190, 6B-193).

The Milwaukee 1980 Facility Plan showed that a complete sewer separation would insure elimination of the water quality standard violations:

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[19] Nor would addressing these problems be simply a matter of challenging Wisconsin's WPDES permit in Wisconsin state courts or in the federal appellate court under § 509. A prerequisite to permit obligations is compliance with § 303 which would have necessitated lengthy litigation in the District Court. *See United States Steel Corp.* v. *Train,* 556 F.2d 822, 836-37 (7th Cir. 1977); *Bethlehem Steel Corp.* v. *Train,* 538 F.2d 513, 517 n.10 (2d Cir. 1976).

This is essentially the same administrative exhaustion issue which Milwaukee argued in 1971, since the water quality standard (§ 303(c)), maximum daily load (§ 303(d)), and § 301 (b)(1)(C) procedure is virtually the same as the water quality standard /implementation plan requirements of § 10 of the Federal Water Pollution Control Act Amendments of 1965, P.L. 89-234. In 1972 the Court *sub silentio* rejected this identical argument.

> "Complete sanitary separation completely eliminates all FC [fecal coliform] violations due to the CSO."
>
> Facility Plan, p. 60-19
>
> * * *
>
> "The resolution cits [sic] the following advantages of sewer separation over other considered alternatives: ... Least capital cost ... Lower operation and maintenance cost ... Assures minimal risk to the environment ... Removes all human fecal waste from area waterways."
>
> Facility Plan, p. 7-11

This lower cost, completely effective means of achieving water quality standards was never presented to the District Court. As soon as this Court granted certiorari Milwaukee terminated all discussions about low cost alternatives which would achieve water quality standards.

B. Wisconsin Permits Are Not a Defense

Milwaukee seeks to justify the weakness of the Wisconsin abatement requirements through a number of procedural ploys. First, Milwaukee's compliance with these open-ended vague Wisconsin obligations is not a defense to claims under federal and state nuisance law. Section 402(k) states that a state NPDES permit shall be a defense to actions brought under § 309 (action by United States) or § 505 (action by private citizens) to enforce the Act. However, an action for nuisance is not a § 309 action nor a § 505 action. *See Stream Pollution Control Board* v. *United States Steel Corp.*, 512 F.2d 1036, 1041 (7th Cir. 1975). A permit by an administrative agency is no defense to a nuisance action.[20]

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[20] *New Jersey* v. *City of New York*, 283 U.S. 473, 482-83 (1931). The law of most states, including Wisconsin and Illinois, is in accord. *See Costas* v. *City of Fond du Lac*, 24 Wis.2d 409, 129 N.W.2d 217, 220 (1964); *Landfill, Inc.* v. *Pollution Control Board*, 74 Ill.2d 541, 387 N.E.2d 258, 265 (1978); *People ex rel. Scott* v. *United States Steel Corp.*, 40 Ill.App.3d 607, 352 N.E.2d 225 (1976); *Venuto* v. *Owens-Corning Fiberglas Corp.*, 22 Cal.App.3d 116, 129, 99 Cal. Rptr. 350, 359 (1971); *State ex rel. Shevin* v. *Tampa Electric Co.*, 291 So.2d 45 (Fla. App. 1974); *Commonwealth ex rel. Schumaker* v. *New York & Pa. Co.*, 367 Pa. 40, 79 A.2d 439 (1951).

C. Illinois Permit Requirements Are As Strict As The Judgment Order

Next, Milwaukee argues that Illinois requires less stringent controls for separate sewer overflows and combined sewer overflows than Milwaukee must meet. Milwaukee is again wrong. As to separate sanitary sewer overflows, Illinois Pollution Control Board Rule 602 states that "[o]verflows from *sanitary* sewers are *expressly prohibited.*"

As to the combined sewer area, Illinois requires combined sewer discharges to achieve water quality standards as required by § 303(c) and § 301(b)(1)(C) of the federal Act. Contrary to Milwaukee's assertion Illinois cannot make these point sources exempt from the statutory obligations of § 303(c) and § 301(b)(1)(C). The *maximum* delay permitted under the Clean Water Act to meet water quality standards by municipalities is 1983 and that would require special permission from the EPA Administrator. § 301(i).

VII

"COST-EFFECTIVENESS" AS USED IN THE CLEAN WATER ACT MEANS THE LEAST RESOURCE COST TO ACHIEVE THE REQUIREMENTS OF THE ACT: "COST-EFFECTIVENESS" DOES NOT ALLOW MILWAUKEE TO VIOLATE WATER QUALITY STANDARDS UNDER § 301(b)(1)(C) AND § 303(c).

Milwaukee argues that the cost of achieving Wisconsin's water quality standards for Lake Michigan should allow Milwaukee to both avoid and delay its obligation in two ways:

1. Milwaukee argues that the Federal Act requires it to eliminate only those water quality standards violations that are "cost-effective" to eliminate; water quality standards violations which are not cost-effective to eliminate need not be eliminated no matter how degraded the Lake may be or how many violations continue.

2. Milwaukee argues that it only needs to eliminate these "cost-effective" water quality standards violations at its own financial convenience—even if its convenience means a 50 year completion schedule and despite the 1977 deadline contained in § 301(b)(1)(C). As a part of this argument, Milwaukee argues that the requirement to comply with § 301(b)(1)(C) depends on federal grant funds being available.

Milwaukee bases almost all of its arguments on Title II of the Federal Act—particularly the "cost-effective" language of § 212 and § 217. But § 212 and § 217 do not allow Milwaukee to continue water quality standards violations. Indeed § 212(2)(B) of the Act (Ill. App. 7a) specifically provides that federal grant funds shall be used to fund "the most cost efficient alternative to *comply with sections 301...*" (emphasis added). Section 212(2)(C) then mandates that the EPA publish guidelines for "cost-effective analysis".

The EPA has promulgated these guidelines which explicitly define cost-effective as being that alternative "which will result in the minimum resource costs over time" to meet federal requirements. 40 C.F.R. Part 35, Subpart E, Appendix A, ¶4b [43 Fed. Reg. 44807 (September 27, 1978)].

Thus "cost-effective" as used in the Clean Water Act and defined by EPA simply means the selection of that treatment system which will result "in the minimum resource costs over time" to meet § 301 requirements. In this case the § 301 requirement, § 301(b)(1)(C), is the effluent limitation "necessary to meet water quality standards".

There is no provision in the Federal Act for permitting a discharge to violate water quality standards adopted pursuant to § 303. There is a mechanism under the Act whereby high quality waters may be "downgraded" by downgrading the water quality standards to a lower level of water quality and lower beneficial use. 40 C.F.R. § 35.1550 (44 Fed. Reg. 30040 (May 23, 1979)). However, this downgrading procedure establishes a very rigorous mechanism for using economic difficulty as a justification for adopting reduced levels of water quality.

Officials in Wisconsin, Illinois and Milwaukee are fully aware of the enormous political reaction that would occur in those States if EPA attempted to approve a "downgrading" of Lake Michigan from a high quality full body contact recreational water to one that allowed no swimming or swimming at limited times only. No one has suggested or applied to downgrade the water quality standards for Lake Michigan.

The sewage agency *amici* and the General Accounting Office (GAO) want Congress to change the law to permit water quality standard violations. GAO has unleashed a barrage of highly publicized reports—including those mentioned by Milwaukee—which on analysis argue that achieving water quality standards is simply not worth the money. *See e.g.*, General Accounting Office, *Many Water Quality Standards Violations May Not Be Significant Enough To Justify Costly Preventative Actions,* CED-80-86 (July 2, 1980). GAO's other reports —such as its critique of Chicago's Deep Tunnel Plan—argue that elimination of water quality standards violations is not worth the cost and that the standards should be relaxed.

Congress has not changed the law. There has been no relaxation of § 303(c) (water quality standards must "protect the public health"); § 303(d) (maximum pollutant loads must be set at a level which insures achievement of water quality standards with "a margin of safety"); and § 301(b)(1)(C) (effluent limitations must achieve water quality standards); or the definition of cost-effective in § 212.

However, Milwaukee has seized upon an informal EPA memorandum for grant funding of combined sewer overflows as a basis to continue violating water quality standards. Program Requirements Memorandum, PRM 75-34 [formerly PG-61]. That memorandum adopts a dramatically different definition of "cost-effective" than that used in § 212. PRM 75-34 adopts a "marginal cost" approach to grant funding which will fund projects even though § 301(b)(1)(C) and § 303(c) water quality standards violations still occur.

Under this "marginal" approach to cost-effectiveness, the discharger need only eliminate those water quality standards where the "marginal" or incremental cost of removing each violation continues to decline. According to this approach, once the marginal costs begin to rise, grant funding stops—no matter how dirty the water or how many illegal water quality standards violations occur.

In its recent facility plan, Milwaukee makes a statement which vividly illustrates Milwaukee's definitional subterfuge.

> "The *cost effective* solution required by the EPA [under PRM 75-34] is *not* necessarily the *cost effective* solution *required to attain water quality standards* [§ 301(b)(1)(C), § 212]. To achieve these standards *additional measures may be required.*"
>
> *Facility Plan,* 3-1 (emphasis added)

Milwaukee wants this Court to give it what it failed to get from Congress. By substituting their own definition of cost-effective in place of that used by Congress, Milwaukee and the sewage agency *amici* hope to obtain from this Court a judicial amendment to the Clean Water Act, giving judicial approval to "cost-effective" violations of water quality standards in violation of § 301(b)(1)(C) and § 303(c) of the Act. This dispute is best left to Congress. If Congress wants to change the law to permit "cost-effective" water quality standards violations, that decision belongs to Congress, not to this Court.

VIII

THE COST TO MILWAUKEE WAS CONSIDERED BY THE COURTS BELOW EVEN THOUGH THE DOCTRINE OF BALANCING DOES NOT APPLY WHEN A PUBLIC HEALTH NUISANCE IS INVOLVED

Milwaukee has made much of the purported cost of the facilities ordered by the District Court. Milwaukee was allowed to present extensive evidence on costs at trial (testimony of Richard Heaps, a financial analyst for Milwaukee, TR. 10838-

11122). Heaps testified that the average cost to a homeowner to meet Milwaukee's obligations if *no* federal funds were available was $5.47 per month. If federal funds are available the cost is $1.04 per month. (D. Ex., item 13; TR 11039-11040). Milwaukee's 300 million dollar claim has no foundation in the record and is based on Milwaukee's illegal "cost effective water quality standards violations" theory.

The law is clear that the courts will not allow a public health hazard to persist on a claim of economic inconvenience. In *People* v. *City of Port Huron,* 305 Mich. 153, 9 N.W.2d 41 (1943), the Michigan Supreme Court affirmed an order to Port Huron to build a sewage treatment plant. The Michigan Supreme Court refused to balance equities or comparative convenience in cases of public health:[21]

> "Even if we should concur with the trial judge in his conclusion that 'a balancing of equities' favors the city, this is not a proper case for the application of that doctrine. The doctrine of 'comparative injury' should be confined to those situations where the plaintiff can be substantially compensated. . . .
>
> "The doctrine of 'comparative injury' should not be invoked to justify the continuance of an act that tends to impair public health."
>
> 9 N.W.2d at 43

The need for Milwaukee to meet the costs of abating its nuisance discharge to Lake Michigan is amply illustrated by the lengthy litigation in *Wisconsin* v. *Illinois,* 289 U.S. 395 (1933). There, the Metropolitan Sanitary District of Greater Chicago and the State of Illinois were required to spend enormous sums to build huge sewage treatment plants. The fiscal convenience of defendants was not balanced against the need to remove the obstruction:

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[21] The court distinguished this Court's decision in *City of Harrisonville* v. *W.S. Dickey Clay Mfg. Co.,* 289 U.S. 334, 339 (1932), on the fact that the injury to the complainant W.S. Dickey Clay Co. was wholly financial and no public health hazard was involved. *See also Commonwealth ex rel. Schumaker* v. *New York & Pa. Co., supra* 79 A.2d at 444; *Board of Comm'rs of Ohio County* v. *Elm Grove Mining Co.,* 9 S.E.2d 813, 817 (W.Va. 1940).

> "It already has been decided that the defendants are doing a wrong to the complainants and that they must stop it. They must find out a way at their peril . . . It can base no defenses upon difficulties that it has itself created."
>
> *Wisconsin* v. *Illinois,* 281 U.S. 179, 197 (1930)

Three years later the Sanitary District and the State of Illinois were back before the Supreme Court. The defendants had been stalling in the construction of the ordered sewage treatment works and Wisconsin petitioned for enforcement.

> "Despite existing economic difficulties, the State has adequate resources, and we find it impossible to conclude that the State cannot devise appropriate and adequate financial measures to enable it to afford suitable protection to its people to the end that its obligation to its sister States, as adjudged by this Court, shall be properly discharged."
>
> 289 U.S. at 410

Clearly economic burdens, even where they do exist —which is doubtful here—cannot be used as an excuse to avoid abatement of a public health nuisance.

IX

THE DISTRICT COURT HAD *IN PERSONAM* JURISDICTION, AND VENUE WAS PROPER IN THE NORTHERN DISTRICT OF ILLINOIS

Milwaukee contends that the case should have been dismissed because the District Court was without *in personam* jurisdiction over the defendants and because venue was improper. These same arguments were rejected by both the District Court (Pet. App. H-1—H-4), and the Seventh Circuit Court of Appeals (Pet. App. A-4—A-6).

A. The District Court Had *In Personam* Jurisdiction

The District Court's jurisdiction over the person of a nonresident defendant is dependent upon the extra-territorial service statute of the forum State. Fed. R. Civ. P. 4(e). In this case the Illinois "long arm" statute, Ill. Rev. Stat. ch. 110, §§ 16

and 17, control. Section 17, which lists the actions of a defendant by which it submits to the jurisdiction of an Illinois court, includes "[t]he commission of a tortious act within Illinois."

The Illinois Supreme Court has squarely held that the long arm statute reflects a conscious legislative purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause. *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761, 763 (1961); *Nelson* v. *Miller,* 11 Ill.2d 378, 143 N.E.2d 673, 679 (1957), and that Section 17 reaches non-resident defendants who commit acts in other States which result in injury in Illinois. *Gray* v. *American Radiator & Standard Sanitary Corp., supra.*[22]

Despite this authoritative construction of the Illinois statute—and the finding by the Court of Appeals that "[e]ach year defendants pump into Lake Michigan millions of gallons of pathogen-containing sewage, which the district court found is sometimes carried into Illinois water and presents a substantial threat of harm to Illinois residents" (Pet. App. A-5)— Milwaukee nevertheless clings to untenable positions. It contends that: 1) its discharge of raw sewage and disease-causing organisms into Illinois waters does not constitute commission of a tortious act in Illinois, and 2) in any event, its discharge of contaminants into Illinois waters does not constitute a sufficient "minimal contact" with Illinois to support *in personam* jurisdiction.

1. Discharge of Pathogens Into Illinois Waters Con stitutes The Commission Of "A Tortious Act Within" the State of Illinois.

It is beyond dispute that Illinois' claims against Milwaukee, both federal and state, sound in tort. *Illinois* v. *City of*

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[22] The *Gray* decision was recently cited with approval by this Court in *World-Wide Volkswagen Corp.* v. *Woodson,* ____ U.S. ____, 100 S.Ct. 559, 567 (1980).

Milwaukee, 406 U.S. 91 (1971); *Cf. Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230, 237 (1907). *See also Prosser, Law of Torts* 573-583 (4th ed. 1971).

For purposes of the Illinois long arm statute, "a tort is committed in the place where the injury occurs." *McBreen* v. *Beech Aircraft Corp.,* 543 F.2d 26, 28 (7th Cir. 1976); *Honeywell, Inc.* v. *Metz Apparatewerke,* 509 F.2d 1137, 1142 (7th Cir. 1975); *Consolidated Laboratories, Inc.* v. *Shandon Scientific Co.,* 384 F.2d 797, 802 (7th Cir. 1967); *Gray* v. *American Radiator & Standard Sanitary Corp., supra.*

Illinois alleged and proved that as a result of Milwaukee's discharges of raw and untreated sewage, both the citizens of Illinois and the Lake Michigan territorial waters of Illinois sustained damage; and consequently for the purposes of jurisdiction there is no question but that Milwaukee's conduct constituted the commission of "a tortious act within" Illinois.

2. The Contacts Between Illinois And Milwaukee Are Sufficient To Support *In Personam* Jurisdiction.

Milwaukee's argument comes 100 years too late. In the era of *Pennoyer* v. *Neff,* 95 U.S. 714 (1878), attempts by states to exercise jurisdiction over persons outside of their territorial limits were invalid. This archaic doctrine and the conceptual framework which supported it have been rejected. *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945); *Shaffer* v. *Heitner,* 433 U.S. 186 (1977). The relevant inquiry is whether the actions of the defendant establish "certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" [citation omitted]. *International Shoe, supra* 326 U.S. at 316.

This Court has addressed this question in the context of interstate and international water pollution in *Ohio* v. *Wyandotte Chemicals Corp.,* 401 U.S. 493 (1971). Deciding that Ohio state courts could exercise jurisdiction over Michigan and Canadian defendants on claims arising under state common law nuisance, the Court said:

> "The courts of Ohio, under modern principles of the scope of subject matter and *in personam* jurisdiction, have a claim as compelling as any that can be made out for this Court to exercise jurisdiction to adjudicate the instant controversy . . . ."
>
> 401 U.S. at 500.[23]

Nothing in this Court's recent decision in *World-Wide Volkswagen Corp.* v. *Woodson,* ____ U.S. ____, 100 S.Ct. 559 (1980), suggests any different conclusion than that reached by the two courts below and by this Court in *Ohio* v. *Wyandotte.* In *World-Wide Volkswagen,* respondents sought to ". . . base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom . . ." *Id.* at 568.

Here, by contrast, Milwaukee has engaged in a continuous and purposeful course of conduct—discharging raw and untreated sewage into the interstate waters of Lake Michigan—for a period of time that stretches across decades and continues to this very date. It was both foreseeable and expectable by Milwaukee that Illinois waters and Illinois citizens would suffer damage as a result of Milwaukee's intentional tortious conduct.

The propriety of the District Court's exercise of *in personam* jurisdiction is confirmed by the strength of the State of Illinois' interest in the case. Illinois has enacted special legislation—the Illinois Environmental Protection Act, Ill. Rev. Stat. ch. 111½, § 1001, *et seq.*—to protect the environment and the public health and welfare. Section 12(a) of the Act which provides the basis for Count II of Illinois' complaint, specifically protects and provides redress for Illinois victims who are injured as a result of contaminants discharged in other States. The prior decisions of this Court establish that this expression

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[23] *See* Currie, *Enforcement under the Illinois Pollution Law,* 70 Nw. U.L.Rev. 389, 394-95 (1975). After *Ohio* v. *Wyandotte,* the constitutionality of extra-territorial service under the Illinois long arm statute of complaints against out of state pollution sources "is no longer in doubt."

by the State of Illinois of its "manifest interest" in providing effective redress for citizens who have been injured by nonresidents engaged in an activity that the State treats as exceptional and subjects to special regulation furnishes strong support—if not a separate basis—for the exercise of *in personam* jurisdiction over Milwaukee. *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957); *Hanson* v. *Denckla*, 357 U.S. 235, 252-53 (1958); *Kulko* v. *Superior Court*, 436 U.S. 84, 98 (1978).

Under these circumstances, it is neither unfair nor unreasonable to require Milwaukee to defend its conduct in a federal forum located within Illinois.

B. Venue Was Proper In The Northern District of Illinois

Venue is governed by 28 U.S.C. § 1391(b), which permits suit in *either* the "judicial district where all defendants reside, or in which the claim arose . . . ." The Court's 1972 opinion in this case noted that this provision gives "flexibility" to venue in this case. *Illinois* v. *Milwaukee, supra*, 406 U.S. at 108 n.10. The District Court below found that Illinois' claim arose in the Northern District of Illinois where the injury occurred, and held that venue was proper (Pet. App. H-3—H-4), and the Court of Appeals affirmed (Pet. App. A-6).

1. Illinois' Claims Are "Transitory" Actions

The first issue raised by Milwaukee is whether Illinois' claims—including the federal common law of nuisance—are "transitory" or "local" in nature. Milwaukee has taken the position that the claims are inherently local and must be brought in the judicial district where the municipal corporation is situated.

When this case was previously before this Court, this issue was resolved conclusively against Milwaukee. The Court explicitly ruled that the venue of a claim predicated on the federal common law of nuisance was a federal question governed by 28 U.S.C. § 1391(b); 406 U.S. at 108, n.10 (Pet. App.

I-17).[24] Therefore, by implication, the cause of action is necessarily transitory:

> "Section 1391(b) is the general venue statute governing *transitory* causes of action in federal courts where jurisdiction does not depend on diversity of citizenship."
>
> *Denver R.G.W.R. Co.* v. *Brotherhood of Railroad Trainmen,* 387 U.S. 556, 558 (1967) (emphasis added)

The historical background underlying the distinction between "transitory" and "local" actions is aptly summarized as follows:

> "At the early common law all actions had to be brought in the county in which the events occurred, because those who served as jurors were expected to decide the cases on the basis of their own knowledge of the facts. But with the transition to the present method of proving facts by the introduction of evidence the necessity for trying the case where the cause of action arose ceased to exist. Accordingly, a fiction developed by which the plaintiff would allege that his cause of action had accrued in the county where he brought suit. This allegation became nontraversable in most cases, and such actions were called 'transitory;' those for which it remained traversable were called 'local'."
>
> Note, *Local Actions in the Federal Courts,* 70 Harv. L.Rev. 708, 709-10 (1957)

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[24] Because this suit involves a federal question and the issue of venue depends on federal law, *Leroy* v. *Great Western United Corp.*, ____ U.S. ____, 99 S.Ct. 2710, 2717 n.15 (1979), Milwaukee's reliance on cases involving applications of state law (*Markham* v. *City of Newport News, Va.,* 184 F.Supp. 659, 665 (E.D.Va. 1960); *Parks Co.* v. *City of Decatur,* 138 F. 550 (6th Cir. 1905)) and which were decided prior to 1966—when § 1391(b) was amended to provide flexibility and a choice of venue—is misplaced.

Moreover, the District Court ruling in *Markham* v. *City of Newport News, Va.,* 184 F.Supp. 659 (E.D.Va. 1960) relied on by Milwaukee was later reversed, 292 F.2d 711 (4th Cir. 1961). The Court of Appeals held that even in diversity cases the State of Virginia had no power to localize causes of action against municipal corporations by state statute and thereby oust competent federal courts from jurisdiction.

The unfortunate result of the federal recognition of "local" actions has been that "the federal court in the district where the defendant resides may be unable to hear the action while the court in the district where the property lies may be unable to acquire jurisdiction over the defendant." *Id.* at 708. Consequently, in many cases there has been a complete denial of justice. *See, e.g., Ladew* v. *Tennessee Copper Co.,* 218 U.S. 357 (1910); *Mississippi and M.R. Co.* v. *Ward,* 67 U.S. (2 Black) 485 (1863); *Livingston* v. *Jefferson,* 15 Fed. Cases 660 (No. 8411) (C.C. D. Va. 1811).[25]

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[25] There is confusion even among eminent legal scholars as to the analytic distinction between "transitory" and "local" actions. Professor Moore has characterized the claims in *Ladew* and *Mississippi and M.R. Co.* as "transitory" actions, 1 Moore's Federal Practice, ¶ 0.142[2.-1], at 1366 & n.29; while Wright, Miller & Cooper have labeled the same claims "local," Wright, Miller & Cooper, 15 Federal Practice & Procedure § 3822, at 1316 n.31 (1976).

In *Ladew* the Court held that under the jurisdictional statutes then in effect a diversity action did not give the lower court personal jurisdiction over non-resident defendants, where no parties were residents of the federal district. Plaintiffs, citizens of New York and West Virginia, who owned property in Georgia and were allegedly injured by a mining operation in Tennessee owned by a New Jersey corporation, attempted to show that venue was proper in Tennessee because they could assert a claim to real property (the mining operation) in the district of Tennessee. The Court rejected this claim finding that "[i]n no just sense can their cause of action be said to constitute a claim to real property in the districts." At most, the case stands for the proposition that a nuisance action is not *in rem,* and therefore not local in nature.

In *Mississippi & M.R. Co.,* on the other hand, plaintiff sued *in rem* to abate as a nuisance a bridge over the Mississippi River, claiming that it interfered with the passage of his steam boats. The Court reversed an injunctive decree, stating that the Iowa district court had no *in rem* jurisdiction over the alleged nuisance, because the injury had occurred on the Illinois side of the river where the main channel of the stream lay. The Court expressly noted that *Ward* "asks nothing from the person of the defendant, but seeks to remove a local object," 67 U.S. (2 Black) at 494.

This Court has recognized the difficulties engendered by the "transitory"/"local" distinction and has narrowly limited the application of the "local" concept to actions that are *in rem*. *Casey* v. *Adams*, 102 U.S. 66, 67-68 (1880). Professor Moore is in full agreement with this limited application of the "local" action concept:

> "The true distinction between a local action and a transitory action is the distinction between an action *in rem* and one *in personam*. The character of the remedy sought should be determinative."
>
> 1 Moore's Federal Practice ¶0.142[2.1], at 1362-63

Measured against this standard, it is clear that Illinois' claims, which seek injunctive relief and pertain specifically to Milwaukee, are "transitory" actions.

2. Section 505 Of The Clean Water Act Is Inapplicable

Milwaukee next contends that Section 505 of the Clean Water Act places venue in the Eastern District of Wisconsin. By its very terms, however, Section 505 is inapplicable to this action:

> "Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located."
>
> 33 U.S.C. § 1365(c)(1).

This action was neither (a) respecting an effluent standard or limitation, nor (b) brought under the citizen suit provisions of § 505. *See Stream Pollution Control Board* v. *United States Steel Corp.*, 512 F.2d 1036, 1041 (7th Cir. 1975). The venue limitations of § 505(c) are simply irrelevant.

3. Illinois' Claim "Arose" In The Northern District Of Illinois

In its 1972 opinion in this case, this Court held that venue of Illinois' federal common law claim is governed by 28 U.S.C. § 1391(b) which permits suit in *either* the "judicial district where all defendants reside, or in which the claim arose." 406 U.S. at 108, n.10. The Court noted that the alternatives provided for in the statute give "flexibility to the choice of venue."

The determination of where "the claim arose" for purposes of federal venue under § 1391 is a federal question whose answer depends on federal law. *Leroy* v. *Great Western United Corp.*, ____ U.S. ____, 99 S. Ct. 2710, 2717, n.15 (1979). Under the federal common law of nuisance, this Court has held that an action arises in the place where the injury occurs. *Illinois* v. *Milwaukee,* 406 U.S. at 108, n.10; *Cf. Ohio* v. *Wyandotte Chemicals Corp.,* 401 U.S. at 500. *See also City of Evansville* v. *Kentucky Liquid Recycling, Inc.,* 604 F.2d 1008, 1020 n.36 (7th Cir. 1979).

Leroy v. *Great Western United Corp.,* ____ U.S. ____, 99 S. Ct. 2710 (1979), the case so heavily relied on by Milwaukee, does not compel any different conclusion. To the contrary, *Great Western* confirms the flexibility in § 1391 noted by this Court in its 1972 decision in this case, and supports the decision reached by the courts below.

In *Great Western,* the Court noted that if it is "not clear that the claim arose in only one specific district, a plaintiff may choose between those two . . . districts that with approximately equal plausibility may be assigned as the locus of the claim," 99 S. Ct. at 2718. In that case the Court found that there was "only one obvious locus . . . ." *Id.* Interstate water pollution suits such as this, however, plainly fall within the first category. *Illinois* v. *Milwaukee,* 406 U.S. at 108 n.10; *see City of Evansville* v. *Kentucky Liquid Recycling, Inc.,* 604 F.2d at 1020 n.36.

Venue was not only proper in the Northern District of Illinois—it was also best. Inasmuch as two of the three counts in Illinois' complaint were predicated on the law of the State of Illinois, the federal judges sitting in Illinois are better qualified to construe Illinois law than are judges sitting elsewhere. *Leroy* v. *Great Western United Corp.*, ____ U.S. ____, 99 S. Ct. 2710, 2718 (1979).

CONCLUSION

Illinois respectfully asks this Court to clearly delineate the constitutional choice of forum and choice of law mandates governing determination of this controversy. Illinois can bring an action against a citizen of another State either in Illinois courts or the Supreme Court. Since one count of the complaint was based on federal law, an alternative forum was the federal district court under 28 U.S.C. § 1331.

In any of these courts—Supreme Court, state court or federal district court—the Constitution demands that the law to be applied must be the law which is the source of the substantive right asserted. Where the source of the law is state law, state law must be applied; where the source of the law is federal law, federal law must be applied. Where as here one count of the complaint was based on federal law and two counts were based on state law, the courts must apply federal law to determine federal claims and state law to determine the outcome of the state claims.

Applying these principles to this case, the lower courts and this Court must apply federal law to the determination of the federal law claim and state law to the state law claims brought by Illinois. This is the unequivocal constitutional teaching of *Erie* v. *Tompkins, Guaranty Trust* v. *York* and *Ohio* v. *Wyandotte Chemicals.*

The interstitial federal common law articulated by this Court in *Illinois* v. *Milwaukee* does not conflict with the *Erie* mandate. While federal law—not state law—must necessarily determine the confines of the federal interstitial right, *Erie* mandates that state law—not federal law—must necessarily determine the confines of the state law rights. Federal "interstitial" common law—crafted by judges to fill in the gaps left by the federal statutory scheme consistent with the Congress' purpose—cannot oust (preempt) the concurrent application of state statute and common law unless Congress clearly expresses such an intent.

Congress, in addressing the problem of water pollution was clearly concerned about the establishment of a nation-wide minimum floor of technology-based effluent limitations. However, Congress clearly left to the States their long-held power to seek state law judicial remedies against pollution of their interstate territorial waters—regardless of whether that pollution was caused by a citizen of the aggrieved State or by a nonresident.

Viewed within this constitutional and statutory framework and the overwhelming evidence of liability, Milwaukee's thirteen years of procedural maneuvers to avoid its responsibility for pollution of Lake Michigan must come to an end. The District Court Judgment Order provides clear, enforceable substantive requirements with reasonable but firm deadlines. The Judgment Order is also consistent with the requirements of Wisconsin, Illinois and federal law, and also provides a flexible mechanism for modification, should lower cost alternatives be developed.

For all these reasons, Illinois asks that the Judgment of the District Court as affirmed by the Court of Appeals on the issues raised in No. 79-408 be affirmed by this Court and further that this Court deny all relief requested by said petitioners.

Respectfully submitted,

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IN THE
SUPREME COURT FOR THE UNITED STATES

October Term 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
BRIEF FOR RESPONDENT STATE OF MICHIGAN

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QUESTIONS PRESENTED

A. WHETHER THE FEDERAL COMMON LAW OF NUISANCE PROVIDES A NECESSARY AND VIABLE REMEDY FOR INTERSTATE WATER POLLUTION DISPUTES?

1. WHETHER THE FEDERAL WATER POLLUTION CONTROL ACT, AS AMENDED IN 1972 AND 1977 PRESERVES STATES RIGHTS TO APPLY MORE STRINGENT EFFLUENT LIMITS WHERE GENERAL LIMITS ARE INADEQUATE?

2. WHETHER CONGRESS INTENDED THE PASSAGE OF THE FEDERAL WATER POLLUTION CONTROL ACT, AS AMENDED, TO EFFECT A PRE-EMPTION OF THE FEDERAL COMMON LAW OF NUISANCE AS A REMEDY FOR INTERSTATE WATER POLLUTION?

3. WHETHER THE JUDICIAL DOCTRINE OF PRIMARY JURISDICTION BARS FEDERAL COMMON LAW ACTIONS IN THE FEDERAL DISTRICT COURTS?

B. WHETHER APPLICATION OF THE PREPONDERANCE OF THE EVIDENCE STANDARD OF PROOF TO THE FACTS AND CIRCUMSTANCES OF THIS CASE IS IN ACCORDANCE WITH PRIOR DECISIONS OF THIS COURT.

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BRIEF FOR RESPONDENT STATE OF MICHIGAN

The Opinions Below, Jurisdiction, and Statutory Provision Involved sections of Brief of Petitioners are satisfactory to Respondent, State of Michigan.

STATEMENT OF THE CASE

The State of Michigan (hereinafter 'Michigan') includes this complete statement of the case rather than rely upon or merely correct inaccuracies in the statement contained in petitioners brief. Petitioners' statement of the case fails to set out all the facts that are material to the questions presented. Rather it consists primarily of argument.

This case had its origin in the Supreme Court decision in *Illinois* v. *Milwaukee*, 406 US 91 (1972). In that case the State

of Illinois sought leave to file a complaint based on the Supreme Court's original jurisdiction against four cities and two local sewerage commissions of the State of Wisconsin. Illinois alleged that these municipalities were polluting Lake Michigan, an interstate body of water, by the discharge of raw or inadequately treated human sewage, and sought the abatement of the alleged public nuisance. This Court denied the motion for leave to file under the Court's original jurisdiction without prejudice to the right of the State of Illinois to file an action under 28 USC §1331 in an appropriate United States District Court. This Court indicated that such an action could be premised upon the federal common law of nuisance.

On May 19, 1972, shortly after the Supreme Court's decision, the State of Illinois commenced the present action in the United States District Court for the Northern District of Illinois. The State of Michigan was granted leave to intervene as a party plaintiff on November 21, 1972.

In October 1972, Congress enacted PL 92-500; 33 USC 1251, et seq the Federal Water Pollution Control Act Amendments of 1972 (the "Act" or "FWPCA"). That enactment —made substantial changes to the language of the Federal Water Pollution Control Act, Act June 30, 1948, C748 which was amended numerous times through early 1972; Sec 33 USC §466 et seq, 33 USC §1157 et seq. For purposes of this case, however, the pertinent amendments are those which occurred in October 1972.

In December 1977, Congress further amended the FWPCA through passage of PL 95-217. In Michigan's view these amendments have little effect on the portions of the FWPCA pertinent to this action. Subsequent to service of the complaints, Milwaukee moved to dismiss the action on the ground that the trial court lacked personal jurisdiction, and that venue of the action did not properly lie in the Northern District of

Illlinois. The District Court denied these motions. *Illinois* v. *Milwaukee,* 4 E.R.C. 1849 (N.D. Ill. 1972) (App.). Milwaukee then moved to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. This motion was also denied. *Illinois* v. *Milwaukee,* 366 F. Supp. 298 (N.D. Ill. 1978). This action was brought against the cities of Milwaukee, Kenosha, Racine and South Milwaukee and the Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee. Negotiated agreements with the cities of Kenosha, Racine and South Milwaukee were completed prior to the trial. Thereafter, those municipalities did not take an active role in the proceedings.

Trial commenced on January 11, 1977. During the ensuing six months over 14,000 pages of transcript were produced, and hundreds of exhibits entered into evidence. The testimony covered highly technical subject matter and involved extensive use of expert testimony to present scientific facts and theories in such fields as limnology, oceanography and virology, as well as engineering concepts.

The thrust of the State of Michigan's allegations were that discharges of raw or inadequately treated sewage from petitioners' wastewater treatment facilities or directly from sewers during combined sewer overflows (CSO) contributed excessive nutrients, primarily phosphorus, to Lake Michigan. Such discharges were alleged to be contributing to the "cultural" or "accelerated" eutrophication (aging) of Lake Michigan.[1] These allegations coincided with similar allegations by the State of Illinois.

In fact the testimony at trial established that the nutrient,

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[1] Eutrophication refers to the increase in nutrient concentration in a body of water and the consequent increase in biological activity, including growth of algae and other organisms. Appendix to Petition for Certiorari B-26. Future citation to petition for certiorari will read as "A. Pet."

phosphorus, is a component of sewage treatment plant discharges (T-12561, 12685) and that sewage treatment plant discharges contribute to "accelerated" eutrophication of lakes into which it is discharged (T-3249). Sewage discharges carry many of the essential elements for plant growth; (T-3254; 2889). Petitioners are the source of an annual phosphorus discharge in excess of 1,000,000 pounds. (Tr. 12929). Phosphorus is one of the key nutrients to increased growth of plant life in Lake Michigan because it is a limiting nutrient (T-3254). Excessive and unlimited growth of such plants leads to development of a scummy or soupy appearance to the entire water column (T-3307) and the shoreline (T-3321), depletion of oxygen in the bottom layers of water; (T-3311, T-3321) and potential taste and odor problems in drinking water taken from the lake (T-3279). Lake Michigan is a major source of drinking water for the inhabitants of the Lake Michigan basin. Further, it is a major recreational attraction.

Based upon the evidence presented the Trial Court made specific findings that "cultural" or "accelerated" eutrophication was occurring in Lake Michigan. Further it found that Petitioners discharges of phosphorus and other nutrients in raw or inadequately treated sewage was a significant cause of this accelerated aging process or eutrophication of Lake Michigan.

> "I find that as a result of the inputs of phosphorus and other nutrients to Lake Michigan, the lake is undergoing accelerated eutrophication. Accelerated eutrophication is that eutrophication which is caused by man, as opposed to the eutrophication which occurs inevitably and naturally." (A. Pet. F-16)
>
> • • •
>
> "Accelerated eutrophication results in taste and odor problems in the lake water. In an advanced state, this

odor problem can affect the use of the water for recreational purposes, and even in a less advanced stage, it can cause problems with drinking water." (A. Pet. F-16)

• • •

"In addition to the odor and taste problems caused by eutrophication, there is a loss of the clarity of the water, which is an aesthetic value important to many people, and I think rightly so. A secchi disc in Lake Superior can be seen at a depth of 60 feet. In Lake Michigan it can be seen at a depth of 10 to 15 feet only. Lake Superior is an ologotrophic lake. Lake Michigan is becoming a lake which exhibits the turbidity typical of lakes inhabited by increasing populations of algae." (A. Pet. F-17).

"The accelerated eutrophication caused by these nutrient inputs is far greater in the in-shore zone than it is in the off-shore zone, but there is no reason to believe that the eutrophication found in the in-shore zone will not spread, and, if not stopped, that it will not spread clear across the lake. That is the way it happened in Lake Erie." (A. Pet. F-17)

• • •

"I find that the waters of Lake Michigan within the territorial boundaries of the State of Illinois are undergoing a process of accelerated eutrophication at the present time and that this process is caused by nutrient inputs, some of which emanate from the defendants. As has been pointed out by everyone in this case, there is no method of identifying any particular molecule of phosphorus or nitrogen or any other chemical as having come from a particular location. But because the waters of the in-shore zone interchange with each other and do mix longitudinally along the shore, it is a fact, both inferrable circumstantially and deducible as a matter of logic, that all input of nutri-

ents along the western shore contribute to the accelerated eutrophication of the entire western shore line." (A. Pet. F-17)

• • •

"Because of the interchange of water between the in-shore zone and the off-shore zone and the eventual mixing of the entire lake, the State of Michigan is exposed to injury and is being injured by the discharges of nutrients by these defendants." (A. Pet. F-18)

• • •

"In any event, I believe that one million pounds of phosphorus from the treatment plants alone, without considering additional phosphorus discharged by the overflows, is a significant input to the lake, and its removal would be significant removal. We know that Milwaukee is the biggest point source on the lake and that, of the total point sources on the lake, the Milwaukee discharges constitute a substantial percentage." (A. Pet. F-20)

The trial court then summarized the totality of the evidence with the following determinations based on the facts in evidence:

"I find from what I believe is clear and convincing evidence that the defendants' sewage discharges into Lake Michigan are presently contributing in a substantial way to the accelerated eutrophication of the in-shore zone of the western shore of Lake Michigan, including waters of Lake Michigan which are within the territorial boundaries of the State of Illinois." (A. Pet. F-22)

• • •

"I find further, on the basis of clear and convincing evidence, that due to the interchange of waters in the

> in-shore and off-shore zones, the defendant's discharges, if continued at anything like present levels, will substantially contribute to the accelerated eutrophication of Lake Michigan as a whole, including waters within the territorial boundaries of the States of Illinois and Michigan." (A. Pet. F-23)

As a result of these findings the Court imposed a limitation on the concentration of phosphorus that petitioners may discharge from their sewage treatment facilities. That limitation is set at a concentration no more that one (1) miligram per liter (1 mg/1) based on a monthly average. (A-361). The Seventh Circuit affirmed the district court order insofar as it imposed this particular effluent limitation for phosphorus discharges.

SUMMARY OF ARGUMENT

A. This Court specifically recognized the Federal Common Law of nuisance as a remedy for interstate pollution problems in *Illinois* v. *City of Milwaukee*, 406 U.S. 91, (1972). Although the Federal Water Pollution Control Act was amended comprehensively since that decision the Act contains clear congressional intent to preserve the federal common law remedies. Sections 505(e) of the Act, 33 USC 1365(e) enunciates the intent to preserve all existing remedies. Section 511, 33 USC 1371 preserves the authority of Federal officers or agencies and may be applied to include Federal Courts. Thus, federal common law of nuisance actions may be heard in federal courts. The imposition of more stringent limits than generally applicable is specifically authorized by Sections 301, 33 USC 1311 and Section 510; 33 USC 1370 of the Act.

B. In order to pre-empt the common law through enactment of a federal statutory scheme Congress must clearly manifest intent to cause such pre-emption. In this case, Con-

gress has not only failed to manifest intent to pre-empt the federal common law of nuisance, but, it has in fact indicated an opposite intent, i.e. the preservation of common law remedies.

C. The doctrine of "primary jurisdiction" is not applicable to this case to oust the federal district court of jurisdiction. Where a statute contains a savings clause preserving common law rights the doctrine need not be applied unless failure to do so would cause irreconciable conflict between the statutory scheme and the preserved common law remedies *Nader* v. *Allegheny Airlines*, 426 US 290, (1976). The FWPCA preserves common law remedies. Application of and compliance with the Court-imposed phosphorus limitation is not inconsistent or in conflict with Petitioners State of Wisconsin issued National Pollutant Discharge Elimination System (NPDES) permit requirements.

D. The "preponderance of the evidence" standard of proof applied by the Trial Court in this case was the appropriate standard and is in accord with the decisions of this Court. The "preponderance of the evidence" test is the widely applied standard for nuisance actions of common law. This Court has applied it where interstate pollution cases are involved. *Georgia* v. *Tennessee Copper*, 206 US 230 (1907).

The "clear and convincing" standard, on the other hand, is generally applied where the interstate dispute concerns two states. *Ohio* v. *Wyandotte Chemical Corp.*, 401 US 493 (1971). This Court has applied the "clear and convincing" standard in part in order to give recognition to the State's status as a sovereign. Such status is not applicable to the petitioners in this case. Thus, the rationale for application of the "clear and convincing" standard is inapplicable, as well.

E. The Petitioners are the major contributors of point source sewage discharges to Lake Michigan. Sewage discharges contain excessive concentrations of the nutrient phosphorus. Such discharges are a major cause of the accelerated eutrophication (aging) of Lake Michigan.

ARGUMENT

A. THE FEDERAL COMMON LAW OF NUISANCE PROVIDES A NECESSARY AND VIABLE REMEDY FOR INTERSTATE WATER POLLUTION DISPUTES.

This Court recognized the federal common law of nuisance as a remedy for interstate water pollution problems in *Illinois* v. *Milwaukee*, 406 US 91 (1972). Petitioners (hereafter 'Commissions') appear to argue that in light of the passage of the Federal Water Pollution Control Act amendments of 1972 and 1977, (hereafter 'FWPCA' or 'the act') the federal common law of nuisance is no longer a necessary or appropriate remedy for interstate water pollution disputes. Their arguments seem based both on the claim of congressional pre-emption of the subject matter by comprehensive legislation, i.e. the FWPCA, and the doctrine of "primary jurisdiction" by which courts should defer to administrative determinations under the FWPCA.

Respondent, State of Michigan (hereafter 'Michigan') submits that the Commissions' arguments, however grounded, do not comport with either congressional intent or with prior decisions of this Court. Just as significantly, Michigan submits that despite passage of the amended FWPCA subsequent to *Illinois* v. *Milwaukee* supra, the federal common law continues to be a necessary and appropriate remedy for interstate water pollution problems, supplemental to the legislative scheme of the FWPCA.

1. THE FWPCA PROVIDES FOR STATE APPLICATION OF MORE STRINGENT EFFLUENT LIMITATIONS ON POINT SOURCE DISCHARGES WHERE GENERAL LIMITS ARE INADEQUATE.

The plain language of the FWPCA demonstrates congressional intent to provide broad state authority to deal with specific water pollution problems not adequately addressed by the general minimum effluent limits imposed under the Act. Section 101; 33 USC 1251 sets forth the following broad declaration of goals:

> "Sec. 101(a) The objective of this act is to restore and maintain the chemical, physical and biological integrity of the nation's water . . ."
>
> "(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of *states to prevent, reduce and eliminate pollution,* to plan the development and use . . . of the land and water resources. . . ." (Emphasis supplied).

The above-quoted language indicates congressional intent to provide within the framework of the FWPCA a broad scope of activity for states in combatting pollution problems. This language was included in the 1972 amendments. It remains exactly the same following the 1977 amendments. Significantly, Congress did not make any change in the language or the policy which it reflects.

Section 301(b)(1)(B) of the FWPCA; 33 USC 1311(b)(1)(B); provides that the administrator of the United States Environmental Protection Agency (hereafter USEPA) will establish effluent limitations for publicly-owned wastewater treatment works. These limits are of a general nature and prescribe the minimum level of regulation. For example, municipal

wastewater treatment facilities were to have achieved a minimum of secondary treatment not later than July 1, 1977. The USEPA has, by regulation, imposed secondary treatment discharge limitations of 30 miligrams per liter (mg/1) biological oxygen demand (BOD) and 30 mg/1 total suspended solids (TSS)[2]. However, this established limitation need not set an absolute uniform discharge limit for all circumstances. Subparagraph (C) of §301(b)(1); 33 USC 1311(b)(1)(C) provides that a state may establish *any* more stringent limitations, including those necessary to meet water quality standards, whenever deemed necessary by that state. The pertinent provision reads in part as follows:

> "(b) In order to carry out the objective of this chapter there shall be achieved—
>
> • • •
>
> "(1) (C) not later than July 1, 1977, any more stringent limitation including those necessary to meet water quality standards, treatment standards, or schedule of compliance, *established pursuant to any state law or regulation, (under authority preserved by section 510)* or *any other federal law* or regulation or required to implement any applicable water quality standard established pursuant to this act." (Emphasis supplied).

Clearly under the FWPCA, states maintain authority to develop and enforce more stringent limitations than those required under §301; 33 USC 1311. The USEPA limit is not intended to be the exclusive and ultimate limit; states may set and impose more stringent limits.

Section 510 of the FWPCA; 33 USC 1370, dovetails neatly with §301(b)(1)(C); 33 USC 1311(b)(1)(C) to clearly set

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[2] See 40 CFR §133.102.

forth congressional intent that states retain broad authority to apply more stringent effluent limitations to point source dischargers than provided for in the federal statute. That section provides in part:

> "Sec. 510. Except as expressly provided in this act, nothing in this act shall (1) preclude or deny the right of any state or political subdivision thereof . . . to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation . . . is in effect under this act, such state or political subdivision . . . may not adopt or enforce any effluent limitation, . . . which is less stringent than the effluent limitation . . . under this act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the state with respect to the waters (including boundary waters) or such states."

The states are clearly empowered by Congress to implement and apply more stringent limitations (but not less stringent) on discharges. In fact the State of Michigan has imposed more restrictive limits on the effluent of municipal wastewater treatment facilities in several Lake Michigan basin communities[3]. Nor do the FWPCA sections discussed thus far indicate any congressional limitation on States' use of appropriate judicial forums. In fact, the explicit preservation of rights contained in proviso number 2 in the above quoted Section 510 of the FWPCA seems a clear indication that state remedies for pollution of interstate waters, including federal common law nuisance claims, are to remain viable options in

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[3] State issued NPDES Permit No. MI 0026069 limits the City of Grand Rapids sewage treatment facility to a discharge of 10 mg/l BOD and 15 mg/l suspended solids calculated on a 30 day average. State issued NPDES Permit No. MI 0023108 imposes similar limits on the City of Holland sewage treatment facility.

the abatement of water pollution problems. By way of example, in a recent Federal action the State of Michigan has compelled a municipality to comply with the provisions of a state issued discharge permit which requires elimination of combined sewer overflows.[4]

Reference to the Legislative history of the FWPCA rather pointedly confirms that Congress intended to preserve the rights of states to apply more stringent discharge limitations. The following colloguy involving the chief senate sponsor of the Act is illustrative:

> "Mr. Nelson.—May I ask one question: Is there anything in the bill that would prohibit any State from establishing any water quality standard higher than the standards established under this act?
>
> Mr. Muskie. I say to the Senator that I wanted to check with the staff to be sure I was correct that the States' rights are fully protected.
>
> Mr. Nelson. They may have a higher standard?
>
> Mr. Muskie. That is correct."
>
> 1 Legislative History of the Water Pollution Control Act Amendments of 1972 p. 206. (Hereafter 'Legislative History').

With respect to the authority preserved by Section 510; 33 USC 1370 the Congressional Conference Report stated:

> "Section 510 provides that States, political subdivisions, and interstate agencies retain the right to set more restrictive standards and limitations than those imposed under this Act."

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[4] State of Michigan, et al v. City of Allen Park, Fed. District Court, Eastern District of Michigan File No. 79-74681.

1 Legislative history 331.

This Court has given recognition to the right of States to establish more stringent discharge limitations than those general limitations applied under the federal authority of the Act. In *EPA* v. *California,* 426 US 200; (1975) this Court generally reviewed the impact of the 1972 amendments to the FWPCA on water pollution regulation, enforcement and abatement. This Court specifically recognized in *EPA* v. *California,* supra p 204, 220, a States' right to set more stringent limitations in appropriate circumstances and further indicated that under proper conditions the USEPA is obligated to include such more stringent limits established by States in permits it issues. Accord,: *U.S. Steel* v. *Train,* 556 F2d 822 (7th Cir 1977); *Mianus River Committee* v. *EPA,* 541 F2d 899 (2d Cir. 1976).

2. THE FWPCA AS AMENDED IN 1972 AND 1977 PRESERVES COMMON LAW RIGHTS AND REMEDIES INCLUDING FEDERAL COMMON LAW NUISANCE ACTIONS BY STATES TO ABATE INTERSTATE WATER POLLUTION.

Congress, by enactment of the FWPCA, has established a comprehensive and detailed plan for nationwide water pollution control. Just as clearly, however, as discussed in Section A hereof, the effluent limits and other control measures imposed under the Act do not preclude State imposition of more stringent limitations. *Section 510; 33 USC 1370,* supra. These preserved States' rights read together with the Congressional statement in Section 511(a)(1); 33 USC §1371(a)(1) that nothing in the Act "shall be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent" with the Act, suggests that federal courts retain their jurisdiction to hear actions under the federal common law of nuisance. Such actions may be brought to apply more stringent limita-

tions to particular discharges based upon the specific factual situation. Application of more stringent limitations, through a federal court where necessary, would be in accordance with the proper "authority" of an "officer of the United States under other [federal] law," i.e. federal common law of nuisance. The application of more stringent limits is certainly not inconsistent with the purposes and intent of the Act.

A further significant indication of Congressional intent to preserve the role of the courts and federal common law claims is found in the "citizen suit" provisions of the Act, Section 505; 33 USC 1365. Section 505(a) establishes the cause of action on behalf of private citizens. Section 505(b), (c) and (d) specify certain notice, venue and other factors applicable to such suits. The key provision of that section for purposes of this case is Section 505(e), which reads as follows:

> "(e) Nothing in this section shall restrict any right which any person (or class of persons) may have *under* any *statute or common law* to seek enforcement of any effluent standard or limitation or *to seek any other relief* (including relief against the administrator or a state agency)." (Emphasis supplied).

Under Section 505(a) Congress specifically provided for a greater access to the courts for 'citizens' as defined in section 505(g). The purpose of such actions was to facilitate enforcement of effluent limits and administrative orders and further to provide a means of ensuring governmental compliance with duties imposed by the Act. Then Section 505(e) indicates that by providing for these 'citizens suits' under 505(a) other rights to bring actions were not displaced. See *Natural Resources Defense Council* v. *Train* 510 F2d 692 (D.C. Cir 1975) dealing with the inter-relationship of Sections 505(a), (b) and (e) and their impact on Federal Court jurisdiction under 28 USC §1331 and the Administrative Procedures Act, 5 USC

§§701-706. The former matter is of particular pertinence. The D.C. Circuit determined that it must look to the legislative history to establish the relationship of the subsections mentioned. First, the D.C. Circuit referred to the legislative history of the Clean Air Act Amendments which preceded and were the model for smilar provision in the FWPCA. It determined that:

> "The legislative history of the Clean Air Act Amendments reveals that the citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the act would be implemented and enforced." (510 F2d 692, 700).

It also determined that the same intent of Congress was exhibited in the FWPCA amendments of 1972. Consequently, the court concluded as follows:

> "The limitations, in subsections (a) and (b) of §505, restrict the expansion of jurisdiction provided by the special citizen suits provision of §505(a), and do not cut back on federal court jurisdiction over actions that would have been maintainable even in the absence of that special authorization. This intent is confirmed by the savings clause of subsection (e)." (510 F2d 692, 702).

The Second Circuit made a similar analysis regarding the citizen suit provisions and specific effect of §505(e) of the FWPCA. Both *Conservation Society of Southern Vermont* v. *Secretary of Transportation,* 508 F2d 927 (2d Cir. 1974) and *Natural Resources Defense Council* v. *Callaway,* 524 F2d 79 (2d Cir. 1975), are in accord with *NRDC* v. *Train, supra.*

The same analysis applied to Section 505(e) supports continued federal court jurisdiction of federal common law ac-

tions. In *Illinois* v. *Milwaukee, supra,* p. 8, this Court provided that federal common law actions should be brought under 33 USC §1331. Nor is there anything in Section 505(e) that suggests that it only applies to state common law actions and excludes those under federal common law.

Significantly, when the FWPCA was amended in 1977 following the above line of cases, the 'citizen suit' provisions remained unchanged. Congress showed no inclination to alter the broad role courts would play in effectuating the purposes of the Act.

Even though Congress provided a comprehensive water pollution control scheme through passage of the FWPCA, it also preserved and fostered a broad role for the courts as well. Through actions under the federal common law of nuisance the courts may play an important role in implementing the purposes of the Act.

3. CONGRESS DID NOT INTEND PASSAGE OF THE FWPCA TO PRE-EMPT THE FEDERAL COMMON LAW OF NUISANCE AS A REMEDY FOR INTERSTATE WATER POLLUTION.

Whether a federal statutory scheme results in a pre-emption of common law depends upon congressional intent. The purpose of Congress is the ultimate touchstone. *Malone* v. *White Motor Corp.* 435 US 497 (1978); *Ray* v. *Atlantic Richfield Co.* 435 US 151 (1978). Here there is no evidence that Congress intended the common law remedies already in existence to be pre-empted. In fact, as discussed in part I, A and B of this brief the contrary intent is clearly evident.

This court has also grounded a determination of pre-emption of other law upon a finding of conflict between it and federal law. A conflict will be found where compliance with both

federal and state regulations is a physical impossibility. *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 US 132 (1963). There is no evidence that compliance with the court order in this case will cause Petitioners compliance with their NPDES permit or any other applicable portion of the Act or regulations to be a 'physical impossibility'. The court ordered a limit upon discharge of the nutrient phosphorus from the Petitioners sewage treatment plants is identical to their state imposed NPDES permit limitation on phosphorus discharges.

Petitioners purport to find support for their position that the FWPCA and the effluent limitations promulgated thereunder by the USEPA are the sole limitation that may be placed upon municipal wastewater discharges in *Committee For The Consideration of the Jones Fall Sewage System* v. *Train,* 539 F2d 1006 (4th cir 1976). However, careful reading of the *Jones Falls* case shows that Petitioners' reliance upon that case is misplaced. In the *Jones Falls* case, the court was very careful to point out that the complainant therein was not a state nor was there an allegation of interstate harm. The ruling was based squarely on the fact that the alleged pollution was *intrastate,* i.e. 'local' in nature according to the court's analysis. On that basis alone, and without regard to the merits of the Court of Appeals decision in that case, it is distinguishable from the case at bar.

Two other facets of the *Jones Falls* case should be noted. First, under the facts of the case the fourth circuit acknowledged that State courts could apply State common law more rigidly to the discharges at issue. Second, had the facts that exist in the case at bar been present, i.e. state complainant and interstate pollution the fourth circuit undoubtedly would have recognized the application of the Federal common law of Nuisance.

The following quotation from the *Jones Falls* case, is of pertinence:

> "We may thus take it as established that there is a body of federal common law by which a public nuisance in one state which infringes upon the environmental and ecological rights of another state may be abated. As thus applied, there is an acceptable accommodation of state and national interest [footnote omitted]. Too, as the Supreme Court observed in *Illinois* v. *Milwaukee*, there is much federal interest in interstate and navigable waters. Yet, the statute was largely designed to enlist the aid of the states and, through state action, to achieve the final objective of purity of waters . . ."

Actually, then, the *Jones Falls* case provides support for the continued viability of the federal common law of nuisance, at least as applied to the circumstances of this case.

4. THE DOCTRINE OF PRIMARY JURISDICTION DOES NOT APPLY TO BAR FEDERAL COMMON LAW ACTIONS UNDER THE FWPCA.

Petitioners raise this argument in several places in their brief, (pp 17, 18 and 31). They claim that the court should have deferred to the "expert administrative agency." The doctrine of primary jurisdiction is concerned with promoting the proper relationships between courts and administrative agencies. *Nader* v. *Allegheny Airlines, Inc.* 426 US 290 (1976); *United States* v. *Western Pacific R. Co.* 352 US 59 (1956). Where a statute contains a savings clause regarding common law rights the doctrine need not be applied except where failure of the court to defer would cause irreconcilable conflict between the statutory scheme and the preserved common law remedies. *Nader* v. *Allegheny Airlines* and *U.S.* v. *Western Pac. R. Co., supra.*

Application of federal common law remedies pursuant to section 505(e) of the FWPCA does not create a situation of irreconcilable conflict as referred to in prior cases. Compliance with the 1 mg/1 monthly phosphorus discharge limit of lower court order entered here will not conflict with or prevent compliance with the State of Wisconsin's NPDES permit limit of 1 mg/1 discharge monthly average.

With respect to Petitioners' claims that the Courts should defer to the "expert administrative agency", congressional intent appears just the opposite. The legislative history indicates congressional recognition of a broader role for the courts. The following comments as illustrative:

> "There can be little question based on the increasing number of public works projects which are being litigated that individual citizens and environmental groups have turned and are continuing to turn to legal action as a remedy for what they consider to be errors on the part of the Government. They are no longer willing to rely on the administrative process to work but instead have taken the initiative in having the forum for decision-making be in the court room.
>
> The Committee appreciates the growing citizen awareness of their rights to utilize the courts.
>
> However, the Committee is also concerned that this movement to the courts may have been brought about by inadequate recognition on the part of the administrative agencies as to the proper role of the public . . . It is with the understanding that steps are necessary to restore the public's confidence and to open wide the opportunities for the public to participate in a meaningful way in the decisions of government, that the Committee has included

in the proposed legislation various steps to arrive at this goal.

• • •

[The] Fifth [Step] Committee has incorporated into this legislation this section (505) specifically dealing with citizen suits."

2 Legislative History 819.

B. THE STANDARD OF PROOF AS APPLIED BY THE TRIAL COURT AND AFFIRMED BY THE COURT OF APPEALS IS IN ACCORDANCE WITH APPLICABLE LAW.

Petitioners claim that the standard of proof utilized by the Trial Court and affirmed by the Court of Appeals in this case is in conflict with prior decisions of this Court. Petitioners refer to the prior Supreme Court cases, *Missouri* v. *Illinois*, 180 US 208, 200 US 496 (1901, 1906); *New York* v. *New Jersey*, 256 US 296 (1921). Both of those cases involved controversies between states as sovereigns heard under the original jurisdiction of this Court. In recognition of the sovereign status of the States involved and because of the extraordinary nature of the action this Court applied the "clear and convincing" evidence standard of proof. *Ohio* v. *Wyandotte Chemical Corp.*, 401 US 493 (1971). However, in this Court's exercise of its original jurisdiction in interstate pollution cases where only the plaintiff was a sovereign state and the defendant was a private party, the "preponderance of the evidence" standard was applied. *Georgia* v. *Tennessee Copper*, 206 US 230 (1907).

Here the action was brought against a political subdivision of a state. Such political subdivisions are not "states" as used in 28 USC §1251(a)(1), *Illinois* v. *Milwaukee*, supra p. 7. On the other hand the cases cited by Petitioners and mentioned

above involve controversies between sovereign states. Thus the clear and convincing standard of proof required in those cases involving controversies between sovereign states is inapplicable here.

Petitioners claim that there is no evidence of specific algae or taste and odor problems related to Milwaukee's discharges.

Obviously, the record does not include proof that Lake Michigan is now in a eutrophic state. What it does show is that conditions demonstrating the existence of "accelerated or cultural eutrophication" are present. Included in these conditions is the fact of excessive phosphorus discharges by Petitioners (A. Pet. F-20). Further the record demonstrates numerous changes in types and quantities of biological organisms (T-3254) and increase in taste and odor problems in drinking water in waters that are already eutrophic (T-3279). Under Petitioners' apparent theory, in order to garner the empirical and demonstrative evidence to prove a nuisance Respondents would be obliged to wait until the lake had suffered severe and perhaps irreparable pollution, i.e. eutrophication. With evidence then available Petitioners might be willing to cease their discharges. Clearly such specious reasoning must fall of its own weight. The Courts below had before them numerous actual studies at various locations in the Great Lakes and other bodies of water showing changes in the water related to nutrient inputs. (A. Pet. B-26). The record also clearly showed that Milwaukee was the source of over 1,000,000 pounds of phosphorus input into Lake Michigan each year (T-12929). Petitioners' argument that Respondents relied only upon theories is inaccurate.

Petitioners set forth the proposition that the trial Court improperly considered the highly technical matters presented in this lawsuit. Instead, Petitioners would have had the Trial Court defer to the "expertise of the administrative body set

up by Congress to deal with this subject", i.e., the United States Environmental Protection Agency (USEPA). Yet interestingly enough, at no point during the pendency of this action did this "expert administrative body" take an active role in presenting their position or expertise to the Court.

CONCLUSION

Your Respondent, State of Michigan, respectfully requests that this Court affirm the decision of the Court below.

Respectfully submitted,

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No. 79-408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS IN REPLY TO RESPONDENTS' BRIEFS

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Milwaukee, Wisconsin 53202

November 13, 1980

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No. 79-408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS IN REPLY TO RESPONDENTS' BRIEFS

This brief of the petitioners (collectively "Milwaukee") replies to the briefs of the respondents, Illinois [1] and Michigan.[2]

[1] Illinois filed two briefs herein. The first was a typewritten brief filed pursuant to Supreme Court Rule 30.4(b), which prohibits subsequent changes other than references to the joint appendix and the correction of typographical errors. Illinois' first brief substantially exceeded the page limitation of Supreme Court Rule 34.3. On Illinois' motion for permission to file such overlong brief, unopposed by Milwaukee, Mr. Justice Stevens granted only half of the extra pages requested by Illinois, remarking that Illinois' typewritten brief failed to comply with either "the purpose or the letter" of the rules. Illinois, which had previously been accorded *two* extensions of time, used Mr. Justice Stevens' order as an excuse to *add new matter* and *substantially* rewrite its typewritten brief. Milwaukee believes the course taken by Illinois was totally improper and unauthorized, but hereby responds to Illinois' rewritten brief, believing it to be the brief that will be distributed to the Court.

[2] Michigan is an intervenor in this action only with respect to one very limited issue, the claimed accelerated eutrophication of Lake Michigan resulting from phosphorous discharges. The NPDES per-

ARGUMENT

I. ILLINOIS INAPPROPRIATELY AND INCORRECTLY ARGUES THAT ILLINOIS' COMMON LAW AND STATUTORY LAW ARE APPLICABLE.

Illinois' brief devotes many pages to an argument that the judgment below should be affirmed on the basis of Illinois' common law and statutes. *That issue is not before this Court.*

The Court of Appeals said:

> "But it is federal common law and not state statutory or common law that controls in this case, *Illinois* v. *Milwaukee, supra,* 406 U.S. at 107 & n.9, and therefore we do not address the state law claims." Pet. App. A-46 n.53.

Milwaukee's petition for certiorari challenged only that part of the Court of Appeals' decision which affirmed liability under the federal common law claim and required as a remedy the elimination of all overflows in Milwaukee's sewerage system. Illinois' petition for certiorari, which seeks consideration of its state law claims, has not been granted. (Illinois' Petition for Certiorari, Case No. 79-571, October Term 1979: see Issue 4 at 3 and Argument II at 26-30.) Supreme Court Rules 21.1(a) and 34.1(a) make clear that Illinois' state law issues are not properly before this Court. Milwaukee respectfully suggests that those portions of Illinois' brief dealing with questions of state law be disregarded; they should properly be stricken.

While it would be inappropriate to respond in detail to Illinois' state law arguments (impossible in the confines of a reply brief), Milwaukee feels compelled to point out that

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mits under which Milwaukee operates limit Milwaukee's phosphorous discharges to one part per million. Both courts below ordered the same phosphorous limitation. *Compare* P.Ex. 62 at Part II, Page 1, App. 372-373, Tr. 257 and P.Ex. 63 at Part II, page 3, App. 410-411, Tr. 257 *with* Pet. App. D-6 and A-48; App. 361. As Milwaukee is in any event bound by its permits on this subject, no response is directed to Michigan's brief other than as incidentally appears in other portions of this brief and Milwaukee's reply to the briefs of the respondents' supporting amici.

Illinois' major premise—that state law exists in the narrow field of controversies involving the conflicting interests of two or more states in interstate waters—is wrong!

The federal common law of interstate waters was developed in a series of cases dealing with the use or pollution of interstate waters. See, e.g., *Kansas* v. *Colorado,* 206 U.S. 46 (1907); *Missouri* v. *Illinois,* 200 U.S. 496 (1906).

Although this body of federal common law was developed initially in the context of disputes between states, its applicability has not been limited to state versus state cases. As this Court stated in *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972):

> "Thus, it is not only the character of the parties that requires us to apply federal law. See *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230, 237 [Citations deleted.]. As Mr. Justice Harlan indicated for the Court in *Banco Nationale de Cuba* v. *Sabbatino,* 376 U.S. 398, 421-427, where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law. [Citations deleted.] Certainly these same demands for applying federal common law are present in the pollution of a body of water such as Lake Michigan bounded, as it is, by four states." 406 U.S. at 105n.6 (Pet. App. I-14n.6).

Similarly, *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.,* 304 U.S. 92 (1938), was not a state versus state case, but did touch upon the basic interests of federalism. It was a state court case in which a Colorado corporation sued the Colorado State Engineer, challenging the engineer's apportionment of interstate waters between Colorado and New Mexico. The Colorado Supreme Court held that the Colorado corporation had vested rights in these interstate waters, based upon Colorado law. In reversing, this Court held:

> "[W]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." 304 U.S. at 110.

In *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), this Court momentarily seemed to abandon the federal common law of interstate waters. See 401 U.S. at 498n.3. However, in *Illinois* v. *Milwaukee, supra,* a unanimous Court made clear that federal, not state, law controls pollution of interstate waters and that the contrary indication in *Wyandotte* was a result of the Court's preoccupation with other matters in that particular case. See 406 U.S. at 102n.3 and 105n.7 (Pet. App. I-11n.3 and I-14n.7).

Illinois has now come full circle. When this cause was first before this Court in 1972, the Court asked the parties to brief the question, "Would Federal or state law govern the substantive issues sought to be presented for decision in original actions such as this one"? Illinois replied:

> "Plaintiff's unequivocal answer to the question posed is that *federal common law must rule the substantive issues of the case.*" Plaintiff's Brief Regarding the Applicable Law at 2, U.S. Sup. Ct. Case No. 49 Original filed December 9, 1970 (Emphasis in original.).

Illinois went on to argue that position:

> "Here ['even if . . . the complaint is judged by its face as not directly involving a state'] the interests of two states are in harsh competition with each other, political subdivisions of one state claiming that they may use, in the exercise of their public health functions, interstate waters and public water supplies in one way, the other state complaining that such use is inimical to its public health because it contaminates those very waters and constitutes a danger to the life of its citizens. Such conflicting state interests spawning virulent controversies between the antagonists do not lend themselves to, and cannot be settled by, the application of narrow state law principles which by their very nature are fashioned by, and attuned to, the parochial interests of the state whose law is applied. Controversies of that nature must be determined and judged by a law which transcends the local rules of each state and adopts norms that embrace within their purview the sovereign interests of the affected states, viewed in the light of a sound and viable federal system." *Id.* at 7-8.

This case in no way concerns Illinois' authority over dischargers who discharge within its geographical sovereignty. (Section 510 of FWPCA (§ 1370) is therefore inapplicable. See p.8, *infra.*) Rather, this case involves alleged interstate water pollution. The issues raised transcend state lines and affect the interests of several states. Consequently, the law which governs is federal law, not state law.

II. IN THIS CASE THERE IS NO INTERSTICE IN FWPCA TO BE FILLED BY THE FEDERAL COMMON LAW.

The question in this case is whether and to what extent the former federal common law has been modified, limited or superseded by federal legislation and regulations adopted since *Illinois* v. *Milwaukee, supra.* Respondents and their supporting amici repeatedly assert that the federal common law of interstate water pollution is interstitial with respect to FWPCA. However, interstitial federal common law can only fill an interstice in a statutory enactment. Because the federal statutory and regulatory scheme of FWPCA provides the manner in which sewer overflows shall be dealt with, there is no interstice for federal common law to fill in this case.[3]

Interstitial common law by its very nature carries out the policy of a statute. It is really a statutory creature. How then can the EPA and the Solicitor General, speaking for the EPA in support of Illinois, take the position that while EPA is required to fund FWPCA requirements, it need not fund the requirements of the so-called interstitial federal common law remedies because they exceed FWPCA requirements?[4] The argument is a contradiction in terms.

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[3] Section 505(e) of FWPCA (§ 1365(e)) neither preserves nor creates an interstice where none exists. It merely provides that the procedural requirements applicable to "citizen suits" as set forth in the immediate preceding subsections of Sec. 505 do not restrict rights which persons may have under any statute or the common law. See pp. 7-8, *infra.*

[4] This contradictory position is exemplified by the following statements: "The order requires petitioners to construct substantial sewage treatment and storage facilities in addition to the

If the remedy is "interstitial," it is within the statute; it cannot exist outside the statute and be independent thereof.

Milwaukee's federally authorized discharge permits and the Dane County Order, which enforces the permits [5] and also imposes requirements under Wisconsin's geographic sovereignty, specify the approach to and parameters for the control of the various point source discharges (overflows) in Milwaukee's sewerage system, including combined sewer overflows ("CSO's"). P.Ex. 62, P.Ex. 63, P.Ex. 64, App. 371-454, Tr. 257; P.Ex. 1311, App. 454-488, Tr. 9417. See also Milwaukee initial brief at 11-14.

Under FWPCA, the State of Wisconsin can and does deal with the overflow points through the Wisconsin DNR, which acts as a permit-issuing agent of the federal government, functioning within the statutory and regulatory framework of FWPCA. Section 402 (§ 1342). Wisconsin also can and does deal with those overflows independently under Wisconsin's reserved territorial sovereignty over domestic dischargers discharging within the State of Wisconsin. (See Sec. 510 of FWPCA (§ 1370).) The Dane County Order resulted from the simultaneous exercise of Wisconsin's reserved territorial sovereignty over a domestic discharger and its enforcement of the federally authorized permits. Thus Milwaukee's overflows are subjected to

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facilities that petitioners must in any event build to comply with existing Clean Water Act regulations." (Solicitor General's Brief at 12) "EPA and petitioners are currently disputing whether and to what extent federal funds will be available to defray the cost of the sewage treatment works ordered by the court below. See note 9, supra." (Solicitor General's Brief at 13n.25)

[5] In 1976, Milwaukee commenced an action in the Dane County, Wisconsin Circuit Court seeking a declaratory judgment that the Wisconsin DNR's regulation prescribing effluent limitations for publicly owned treatment works was unlawfully promulgated. The DNR counterclaimed, seeking a mandatory injunction. The counterclaim resulted in the Dane County Order, pursuant to which Milwaukee must spend hundreds of millions of dollars upgrading its sewerage system. Note that the amounts in controversy in this action—at the very least $300 million—are in addition to required expenditures under the permits as enforced by the Dane County Order and the other provisions of the Order.

the precise concurrent jurisdiction envisioned by FWPCA. Can it be said that compliance with these pervasive mandates under FWPCA leaves the permittee subject to additional, costly requirements imposed by a federal court acting within a statutory interstice?

III. SECTION 505(e) NEITHER PRESERVES NOR CREATES ANY RIGHTS, AND SECTION 510 IS INAPPLICABLE BECAUSE ILLINOIS IS NOT ATTEMPTING TO REGULATE ONE OF ITS OWN DISCHARGERS.

Illinois argues at pages 42-45 of its brief that Sec. 505(e) of FWPCA (§ 1365(e)) shows congressional intent to "preserve" state law and federal common law remedies.[6] It does not. Section 505(e) only provides that the procedural requirements of the citizen suit provisions of Sec. 505 do not "restrict" the right to seek relief under any statute or the common law. Significantly, Sec. 505(e) neither identifies the applicable statutory or common law to which access is not restricted, nor does it specify any right under any statute or the common law as being a right that is preserved. At most, Sec. 505(e) contemplates the existence of a dynamic body of statutory and common law outside of FWPCA which is responsive to the ever changing needs of society—not a static body of immutable rules frozen forever by the adoption of FWPCA. Clearly Sec. 505(e) was not meant to prevent the courts from fashioning or modifying the common law from time to time as appropriate, and as a part of that common law process

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[6] To the extent Illinois bases its legislative intent argument upon an asserted consistent pattern of lower court decisions, it is guilty of gross oversimplification. See Milwaukee's initial brief at 57n.20. Illinois would also ascribe legislative intent to a typewritten draft of a possible amendment to FWPCA discussed in two extra-record letters, one from a Senator from Illinois and one from an Assistant Attorney General. They relate to a proposal by a Congressman who was not a member of the joint conference committee then considering FWPCA. The typewritten draft was never introduced. It was never discussed by any committee of either house of Congress. It does not appear anywhere in the Congressional Record. Such is not the character of documentation establishing legislation.

to determine whether and to what extent the application of other statutes or common law is appropriate in any particular instance or in any particular class of cases.

Where, as here, legislative and regulatory developments make inappropriate the continued application of particular elements of preexisting law, the courts may act on that conclusion. Sec. 505(e) preserves nothing; it only provides that the procedural requirements of Sec. 505 do not "restrict" access to the law that may exist from time to time.

At page 40 of its brief, Illinois argues that Milwaukee has ignored Sec. 510 of FWPCA (§ 1370). Section 510 merely allows the states to exercise such rights as they may have over dischargers located within their respective geographical jurisdictions. Section 510 does not preserve or create any right to use state statutes or state common law to regulate out-of-state discharges to interstate waters. This is a right the states never had. Any right to control out-of-state discharges to interstate waters must be and is grounded only in federal law.

IV. ILLINOIS' WATER QUALITY ARGUMENT IS MISLEADING.

Illinois misleadingly cites out of context part of Milwaukee's draft Facilities Plan (P.Ex. 35) and Milwaukee's 1980 Facilities Plan (which is not in the record), claiming that Milwaukee's planned solution to combined sewer overflows "will continue to cause water quality standards violations." Illinois' Brief at 51. Other parts of the 1980 Facilities Plan not cited by Illinois show that Illinois is wrong. Moreover, the cited material deals with water quality in *rivers* in Milwaukee, not in the lake. Thus, the material relied on by Illinois does not deal with Lake Michigan water quality, and it certainly does not deal with water over which Illinois can exercise jurisdiction.

A complete review of the 1980 Facilities Plan (which occupies approximately 4 feet of shelf space) shows that *any* water flow (no matter how clean) into the rivers may stir up sediment which adversely affects water quality in the rivers. Thus, because of the presence of storm water

runoff in both the CSO and the separated sewer areas, the complete elimination of all sewer overflows may not achieve water quality standards *in the rivers*. Measures recommended by the Southeastern Wisconsin Regional Planning Commission (1980 Facilities Plan Vol. I-C at 12-30 through 34, Feb. 1980), such as dredging six feet of accumulated silt from the rivers and identifying point and nonpoint sources of discharge along the river not owned or controlled by any of the petitioners, are necessary to achieve water quality standards in the rivers and *are endorsed* by the 1980 Facilities Plan.

V. COST-BENEFIT ANALYSIS IS AN INTEGRAL PART OF FWPCA.

In its original brief at 63-65, Milwaukee explained how FWPCA reflects Congress' intent that costs and the availability of federal funding be considered in water pollution control determinations. Milwaukee, amici in support of Milwaukee, the GAO, and EPA's own FWPCA grant administrators are all conspiring, Illinois says, to mislead this Court about FWPCA's concern for the disproportionate costs of requiring progressively higher degrees of pollution control. Illinois Brief at 55. Illinois is wrong.

Both the express language of FWPCA and the legislative history demonstrate that costs and the availability of federal funding should be taken into account in assessing how far this country should go to control water pollution and the appropriateness of alternative water pollution control measures. For example, FWPCA states that in determining what constitutes "best practicable control technology currently available", required by Sec. 301(b)(1) (§ 1311(b)(1)), EPA shall consider "the total cost of application of technology in relation to the effluent reduction benefits to be achieved" together with other factors such as the age of the facilities involved, the process employed, non-water quality environmental impacts, etc. Section 304 (b)(1)(B) (§ 1314(b)(1)(B)).

When determining what constitutes "best available technology economically achievable", required by Sec. 301(b)

(2) (§ 1311(b)(2)), EPA must consider "the cost of achieving such effluent reduction" as well as the age of the facilities involved, non-water quality environmental impacts, etc. Section 304(b)(2)(B) (§ 1314(b)(2)(B)). Senate Report 92-414 explains that this requires "that the technology must be available at a cost and a time which the Administrator determines to be reasonable. . . ." *Legislative History* at 1470.[7]

Before EPA may establish any "water quality related effluent limitation" under Sec. 302 (§ 1312), it must notice and hold a public hearing

> "to determine the relationship of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this chapter). . . ." Section 302(b)(1) (§ 1312(b)(1)).

FWPCA further provides that the proposed water quality related effluent limitation shall not become effective if the person affected by the limitation demonstrates at such hearing that "there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter) . . . ." Section 302(b)(2) (§ 1312(b)(2)).

In its 1977 Amendments to FWPCA, Congress directed EPA to establish standards for the control of "conventional pollutants" (including BOD, suspended solids, fecal coliform, and pH). Section 304(a)(4) (§ 1314(a)(4)) added by P.L. 95-217 Sec. 48(a)). In determining what constitutes "best conventional pollutant control technology" EPA must consider "the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived" as

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[7] All citations to the legislative history are to "A Legislative History of the Water Pollution Control Act Amendments of 1972," prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (Committee Print 1973).

well as various other factors. Section 304(b)(4)(B) (§ 1314 (b)(4)(B) (added by P.L. 95-217 Sec. 48(b)).[8]

Congress recognized that the process of balancing costs and benefits under FWPCA would often involve difficult questions and subtle judgments. It perceived a lack of existing techniques for measuring relative social benefits and costs in this area, and to remedy that deficiency enacted Sec. 104(a)(6) (§ 1254(a)(6)). That section requires EPA to "initiate and promote the coordination and acceleration of research designed to develop the most effective practicable tools and techniques for measuring the social and economic costs and benefits of activities which are subject to regulation under [FWPCA]. . . ."

Likewise, each state was required to submit to EPA by April 1, 1975, and bring up to date by April 1, 1976 and biannually thereafter, a report including, among other things, an estimate of the environmental impact, the economic and social costs necessary to achieve the objective of FWPCA, and the economic and social benefits of such achievement. Section 305(b)(1)(D) (§ 1315(b)(1)(D)).

The legislative history is replete with evidence of the intent that costs be considered in determining what level of control should be imposed. See, e.g., *Legislative History* at 1116-1118, 1120, 1127-1128, 1221-1222, 1257-1258, 1272, 1281-1283, and 1405-1406. During the Senate debate on FWPCA, then Senator Muskie observed that the drafters did not want to impose "impossible goals", nor did they intend to require "expenditures so excessive that they would undermine our economy." Senator Muskie stated:

> "Consequently, under the proposed legislation, controls must relate the economic and social benefits to be gained with the economic and social costs to be incurred. I mentioned this earlier, in speaking of the

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[8] Note that CSO discharges are regulated under those sections of FWPCA described above. They are not considered publicly owned treatment works for purposes of Sec. 301 of FWPCA (§ 1311). See 40 CFR § 122.3(bb) 45 F. Reg. 33423 (1980) (to be codified at 40 CFR § 122.3) 40 CFR § 125.3(c)(2); 40 CFR § 133.103(a). The Solicitor General is in accord. See Solicitor General's Brief at 7.

> individual members of the committee, that Senator Bentsen constantly and correctly called our attention to the impact and the cost of these programs, being strongly for them, but recognizing them as a part of our total economy." *Legislative History* at 1272.

Senator Bentsen's views on the legislation which he helped draft are instructive:

> "I strongly support the strategy of attempting to control the discharge of effluents. I was concerned, however, that, in its earlier language, the bill was disregarding the economic and social costs inherent in such a massive program of water pollution control.
>
> . . .
>
> Accordingly, while I have some reservations about the attainability of the target dates for a no-discharge policy of pollution control—even as a statement of policy—I am pleased to see language in various sections of the bill which recognizes that there are economic considerations involved in a determination of effluent limitations and water quality standards." *Id.* at 1281.

The foregoing demonstrates that Congress intended cost-benefit analysis and the availability of federal funding to be considered in making water pollution control determinations.[9] The position of Congress on that basic issue

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[9] Members of this Court have recognized the cost sensitivity of FWPCA. *See Industrial Union Dept., AFL-CIO* v. *American Petroleum Inst.*, —— U.S. ——, 48 L.W. 5022 (July 2, 1980), where Mr. Justice Marshall for the dissent said: "It is useful to compare the Act [OSHA] with other regulatory statutes in which Congress has required a showing of a relationship between costs and benefits or of an 'unreasonable risk.' In some statutes Congress has expressly required cost-benefit analysis or a demonstration of some reasonable relation between costs and benefits. See . . . 33 U.S.C. § 1314b(4)(B) (Clean Water Act)." —— U.S. at n.27, 48 L.W. 5049n.27.

Milwaukee firmly believes there is no interstice remaining in FWPCA to be filled by the federal common law in this case. (See pp. 5-7, *supra*) However, if the Court concludes an interstice remains, it should be clear that any remedy imposed pursuant to the federal common law must comply with the policy established by FWPCA, and must therefore be a *cost-beneficial* remedy. By its

reflects a federal interest in costs, an issue which Illinois considers when Illinois is affected but would ignore when Wisconsin is affected.[10]

In this context Illinois falsely implies that the record contains evidence of the cost of eliminating combined sewer overflows and that such evidence shows the cost to be reasonable. Illinois' Brief at 56-57. In fact, the record is absolutely devoid of any evidence concerning the cost of implementing the District Court's total elimination remedy.

The evidence to which Illinois refers relates to Milwaukee's preliminary estimate of the cost of *controlling,* not *eliminating,* CSO discharges. Tr. 10916-10919, D. Ex. 1348 at Item 14. Even the District Court recognized that there was nothing in the record concerning elimination of CSO discharges. In its decision the District Court observed that Milwaukee's engineering consultants were planning to control, not eliminate, CSO discharges. Referring to the "Combined Sewer Overflow Study" (P. Ex. 23-30), the District Court said: "What I find is reference to 'control' of the overflows and 'reduction' of overflows." Pet. App. F-25. The court then proceded to hold that "all overflows must be eliminated." *Id.* The District Court had no idea of the economic burden its mandate would impose, and foreclosed any inquiry on that point: "[T]he cost of eliminating the overflows is not really a factor here"; and "The terms of this order are binding upon the defendants whether or not federal financial assistance becomes available." Pet. App. F-28.[11]

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very nature, interstitial federal common law must carry out the policy of the statute of which it becomes a part.

[10] Illinois misleadingly claims at page 53 of its brief that it "requires combined sewer discharges to achieve water quality standards" under FWPCA. What Illinois fails to tell the Court is that Illinois' regulations condition that requirement upon receipt of federal funding and, in any event, *deem* that requirement met when certain treatment—which is *less stringent* than the District Court requirements—is provided. See discussion of the pertinent Illinois regulations in Milwaukee's initial brief at 80-85.

[11] In this context it must be recognized that Illinois advances two fundamental misrepresentations. Illinois states that Milwaukee

VI. THERE IS NO EMPIRICAL EVIDENCE OF A DANGER TO HEALTH.

In its initial brief, Milwaukee pointed out that there is no empirical evidence in the record supporting a conclusion that Milwaukee's actions present a health hazard, and that there is strong evidence to the contrary.[12] There is no showing of even a single pathogen from Milwaukee or anywhere in the waters of respondents (though the water is out there for examination), and there is no showing of any outbreak of water-bourne diseases in Milwaukee, which draws its drinking water from intakes very near the sewage outfalls complained of, or in Illinois, which is far removed from Milwaukee's outfalls. This fact exists through a one hundred year history even though the diseases Illinois claims to be exposed to have short incubation periods. Regarding this aspect of Illinois' case the District Court stated:

> "In so electing [not to analyze Lake Michigan water for pathogens] it is my opinion that *the state* [*Illinois*] *chose to produce less evidence than it should have.* My guess as to why they elected not to conduct their own

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selected and ordered remedy for overflow elimination by stipulation and that cost evidence shows that the remedy ordered was not overly burdensome. In fact, Milwaukee and Illinois stipulated only to what was the engineering equivalent of a remedy already ordered by the District Court (Petitioners' Reply Brief on Petition for Certiorari at 4-5). As explained above, the cost evidence referred to by Illinois did not relate to the remedy ordered; rather, it related, as the District Court said, to a controlled overflow system and not to the presently ordered drastic remedies requiring total elimination.

[12] Milwaukee draws attention to Illinois' mischaracterization of a number of its contentions on this subject as "undisputed" when in truth they were and are contested. Milwaukee particularly objects to Illinois setting up its arguments and misstatements of asserted fact as though they were quoations of findings of the courts below. Illinois' Brief at ii-iii. They are neither quotations nor findings. As pointed out in Milwaukee's initial brief at 69-80, nowhere does Illinois point to support in the record for its assertions. Nowhere is there anything but speculations of experts without support of empirical evidence. For Illinois to characterize its contentions as "undisputed" is absolutely contrary to fact.

study is that they were afraid of a negative result. Conducting such studies is dangerous, because, of course, they cut both ways; but if the position of the State of Illinois is correct, as I believe it is, a properly conducted study should have resulted in *some circumstantial* evidence that would tend to confirm that *theory.*" (Pet. App. F-10) (Emphasis added.)

The January 1974 *Annual Report Of The Administrator Of The Environmental Protection Agency To The Congress Of The United States In Compliance With Section 26(a) Of The Federal Water Pollution Control Act* at 12 reflects the extremely tenuous nature of Illinois' contentions:

> "*An assessment of health hazards from polluted water involves considerable uncertainty.* There is little doubt that human feces carry infectious pathogens for a number of intestinal diseases, typhoid fever, hepatitis, brucellosis, encephalities, poliomyeliteis, psittacosis, and tuberculosis. *However, there are grave uncertainties about the die-off rates of pathogens in natural waters as well as their infectiousness for swimmers or other recreational water users.* Note that the issue of drinking water is not at stake, since its safety depends on disinfection treatment by the water supply system. *The evidence* that *water polluted with fecal matter can transmit diseases to swimmers is sparse and uncertain,* particularly since it has been discovered that swimmers in unpolluted water also have higher incidences of common ear, eye, and nose infections." (Emphasis added.)

Illinois at pages 6 and 16 of its brief states that Illinois is currently suffering fecal contamination of its northern beaches, and its residents are suffering enteric bacterial and viral diseases, citing transcript and exhibit references. Milwaukee does not claim there is no fecal contamination or enteric disease in Illinois. What Milwaukee says is this: (1) Illinois permits discharges of raw and inadequately treated sewage to waters in Illinois and Lake Michigan; (2) Illinois does not have enteric diseases at levels different from those found in any other area of the country; (3) no pathogen has been shown to come to Illinois from

Wisconsin, much less from Milwaukee;[13] and (4) the major source of transmission of enteric diseases is on a person-to-person basis; this occurs more frequently than through water transmission, and Illinois' enteric diseases are not shown to have been water-bourne. All of Milwaukee's positions, excepting only the lack of any evidence of pathogens coming from Milwaukee, are shown by the very references that Illinois cites at pages 6 and 16 of its brief!

Instead of relying upon empirical evidence, Illinois relies upon the *speculated possibility* that some disease *might* occur if a whole series of hypothetical circumstances and events come together in the correct order and relationship to one another.[14] As Milwaukee pointed out in its initial brief at 69-80, this Court has dismissed past interstate water pollution cases for a failure of proof on the same type of evidence, i.e., conflicting expert testimony in the absence of empirical evidence.

---

[13] The Wisconsin cities of South Milwaukee, Racine and Kenosha, which are located closer to Illinois than Milwaukee, were originally defendants in this case. They were dismissed by the District Court upon the basis of stipulations with Illinois which do not require complete elimination of overflows and which are conditioned upon the receipt of federal funding. See Design Commitment Agreements between Illinois, Michigan and (1) City of South Milwaukee, filed Jan. 12, 1977; (2) City of Racine, filed Nov. 1, 1973; and (3) City of Kenosha, filed Nov. 1, 1973.

[14] At pages 6 and 7 of its printed brief, Illinois cites the report made to this Court by Special Master Albert Maris in another case. (The report was not cited in Illinois' original typewritten brief.) Illinois' quotations are taken out of context and its implications are unsupported. Under the heading "Effect On Lake Michigan of Sewage Effluent Return", the report discussed the effect of the Sanitary District of Chicago discharging 750 cubic feet per second of treated sewage to the lake. In this context the report reviewed the local effects during low wind conditions in which the effluent from the Chicago district would move as an almost undiluted mass to the Chicago water intakes. It is Chicago's discharge under such conditions that the report found should be avoided "if an alternative method of disposing of the contaminant is available" (Master's Report at 203-205).

In essence, the courts below, like OSHA in *Industrial Union Dept., AFL-CIO* v. *American Petroleum Inst., supra* n.9, postulated a danger they considered potentially present and fashioned a remedy regardless of cost or other considerations. In the *Industrial Union* case, the postulated danger was a carcinogen. OSHA's response, in the absence of proof of a safe level for the carcinogen, was to establish as a standard a level that was "technologically feasible and that 'the economic inpact of . . . [compliance with which] will not be such as to threaten the financial welfare of the affected firms or the general economy.'" 48 L.W. at 5030. The danger postulated by the courts below was waterbourne diseases. Without empirical proof of danger, or any evidence regarding costs, the lower courts required elimination of all overflows. They did not even consider costs to the extent of determining whether the economic viability of the municipal defendants was threatened. To the courts below, "the cost of eliminating the overflows is not really a factor here." Pet. App. F-28.

VII. RESPONDENTS SEEK TO IMPOSE CONTROLS TO WHICH THEY DO NOT ADHERE.

At pages 80-86 of its initial brief, Milwaukee pointed out that neither Illinois nor Michigan require the level of control of overflows ordered by the courts below. Michigan makes no response, and Illinois at page 47 of its brief says it has or will eliminate all discharges to Lake Michigan. The record is contrary. Tr. at 4026-4034, 13444-13445, 13450; D. Ex. 170 at 9; see also, GAO, *Report by the Comptroller General of the United States: Combined Sewer Flooding and Pollution—A National Problem. The Search for Solutions in Chicago,* CED 79-77 (May 15, 1979) Vol. 1 at 18. Chicago and Waukegan periodically overflow, with Chicago overflowing sometimes in excess of one billion gallons of untreated sewage to Lake Michigan![15]

[15] Illinois admitted the continuation of its overflows as a fact in this Court in its Supplemental Response of the State of Illinois to Applicants' Motion for Stay Pending Certiorari at 6-7, May 7, 1980.

Chicago is seeking federal funding for its TARP project, which, even if completed, will neither eliminate overflows nor meet water quality standards. *Id.* at 4-5.

Additionally, Illinois' regulatory position in respect of all of its *intrastate* waters, where protection of its citizens should be of most serious concern to the State of Illinois, is not commensurate with the level of effluent purification Illinois would impose on Milwaukee located at least 25 miles away. Respondents' approach throughout this case has been and continues to be "Do as we say, not as we do," an approach which this Court condemned more than 70 years ago. See *Missouri* v. *Illinois, supra,* 200 U.S. at 522.

VIII. *IN PERSONUM* JURISDICTION IS LACKING.

Milwaukee submits that however the federal courts exercise substantive jurisdiction, *in personam* jurisdiction remains as an impossible hurdle for the respondents to overcome in view of the location of the forum *they have chosen.* As Milwaukee pointed out in its initial brief herein, the only basis for *in personam* jurisdiction is the assertion of the presence of the minimal contacts necessary to sustain long-arm jurisdiction, and they are not present. On that subject Milwaukee relies on its initial brief at 86-87.

IX. ILLINOIS' ARGUMENT ON VENUE IS BASED UPON A MISQUOTATION OF THE CRITICAL UNITED STATES SUPREME COURT DECISION.

Despite the complete overhaul of its brief, Illinois continues to rely, with respect to the venue question, on a misquotation of this Court at page 66 of its brief. In *Leroy* v. *Great Western United Corp.,* 443 U.S. 173, 185 (1979), this Court actually said:

> "In our view, therefore, the broadest interpretation of the language of § 1391(b) that is even arguably

> acceptable is that in the unusual case in which it is not clear that the claim arose in only one specific district, [footnote omitted] a plaintiff may choose between those two (or conceivably even more) districts that with approximately equal plausibility—*in terms of the availability of witnesses, the accessibility of other relevant evidence, and the convenience of the defendant (but not of the plaintiff)*—may be assigned as the locus of the claim." (Emphasis on "not" in original; other emphasis added.)

In its misquotation Illinois leaves out the italicized clause, without even indicating that it has done so. This clause is exceedingly significant to this case. Even if Illinois is correct that the claim here involved had its locus in more than one district (not conceded by Milwaukee—see pages 88-89 of Milwaukee's initial brief), Illinois still has selected the wrong forum. The Northern District of Illinois demonstrably does not conform to any of the criteria found in the omitted clause. It was not the forum of convenience for the defendants. The witnesses were not particularly available there, and the evidence was not particularly accessable there. Instead, the forum was sought for the convenience of Illinois, regardless of the other factors present.

Illinois' reliance upon its state law claims to bolster its venue argument is misplaced. (See pp. 2-5, *supra.*)

CONCLUSION

For all the reasons stated herein and in its initial brief, Milwaukee should be granted the relief requested at 90-91 of its initial brief.

Respectfully submitted,

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No. 79-408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS IN REPLY TO BRIEFS AMICI CURIAE OF THE UNITED STATES, STATE OF NEW YORK AND NEW ENGLAND LEGAL FOUNDATION

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This brief of the petitioners (collectively "Milwaukee") replies to the briefs of the respondents' supporting amici, namely, the New England Legal Foundation[1], the Solicitor

[1] To the extent that the amicus brief of New England Legal Foundation deals with FWPCA, as distinguished from problems it is litigating under the Clean Air Act, its arguments are met in the various sections of this brief and Milwaukee's reply to respondents' brief which deal with FWPCA. The short answer to the Foundation is that where FWPCA and federal administrative determinations made thereunder establish permitted conduct in a proceeding in which all interested parties have an opportunity to be heard, it would be anomalous and unwise to afford those same parties the opportunity to proceed in the federal courts under the guise of a "federal common law" to secure relief they chose not to seek in the federal statutory proceedings.

General of the United States and the Attorney General of the State of New York.

ARGUMENT

I. THE SOLICITOR GENERAL'S BRIEF IS MISLEADING.

The Solicitor General has shown little interest in this case. In his response to this Court's initial invitation to state the position of the United States, he suggested that this Court deny review. When this Court granted Milwaukee's petition for review, the Solicitor General assigned the matter for briefing and argument to a junior staff member. As a result the person principally responsible for the brief (see the statement of the Solicitor General in support of the motion to admit Andrew J. Levander *pro hac vice*) is a staff attorney of approximately two years standing.

This may explain why the argument that Sec. 505 of FWPCA (§ 1365) "expressly preserves" the federal common law is based in significant measure on a purported but incorrect quotation of Senator Muskie appearing at page 24 of the Solicitor General's brief, vis.:

> "For example, in a colloquy on the floor of the Senate, Senator Griffin inquired whether passage of the Clean Water Act would affect in any way the then ongoing Reserve Mining Company litigation. 1 Leg. Hist. 191. The Senator specifically noted that this suit, which concerned the discharge of taconite tailings into Lake Superior, was based in part on the federal common law of 'public nuisance' (*ibid.*) See *Reserve Mining Co.* v. *EPA*, 514 F.2d 492, 501 (8th Cir. 1975). Consistent with the position taken by EPA, Senators Muskie [32] and Hart replied that the Clean Water Act would not affect or hinder 'the suit now pending against the Reserve Mining Co., under the Refuse Act of 1899***[,] the existing Federal Water Pollution Control Act or *other law*.' 1 Leg. Hist. 211 (emphasis supplied). See 1 Leg. Hist. 191-194; Senate Hearings, Pt. 1, at 1017-1020.

> See also 1 Leg. Hist. at 248 (similary colloquy between Reps. Dingell and Wright)." (Emphasis in the original.)
>
> Footnote 32 reads:
>
> "[32] Senator Muskie was the primary author of the Clean Water Act and his views are therefore entitled to particular weight. See, *e.g., E. I. duPont deNemours & Co.* v. *Train, supra,* 430 U.S. at 129; *Simpson* v. *United States,* 435 U.S. 6, 13 (1978)."

In this fashion the Solicitor General's brief emphasizes the purported fact that Senator Muskie, the primary author of the 1972 FWPCA amendments, said the suit against Reserve Mining under "other law" would not be affected by enactment of the amendments. In fact, the legislative history bears out neither the argument, the quotation cited, nor the attribution of that quotation to Senator Muskie. Senator Muskie did not utter the phrase "or other law"; Senator Muskie referred to "any other acts of Congress". The argument also attributes to Senator Griffin a reference to "the federal common law of 'public nuisance'" though Senator Griffin never mentioned federal common law.

Senator Griffin did speak about the *Reserve Mining* case.[2] However, his statement of concern mentioned only in passing allegations based on "violation of water quality standards and the allegation that such dumping constitutes a public nuisance." At no time did Senator Griffin mention whether the water quality standards or the public nuisance he was concerned with were federal or state in character. His real concern was with the aspects of the suit resting

---

[2] It is significant, but not referred to by the Solicitor General's brief, that when the issue of the federal common law was dealt with by the Court of Appeals for the Eighth Circuit, it said: "[W]e deem it unnecessary and, indeed, unwise, to also rely on federal nuisance law." *Reserve Mining Co.* v. *EPA,* 514 F.2d 492, 532 (1975).

on the Refuse Act of 1899. He never inquired in respect of common law implications, much less as to the effect on federal, as distinguished from state, common law. He never mentioned, and nowhere does the legislative history deal with, "federal common law." The significant portions of what Senator Griffin in fact said follow.

Senator Griffin said:

> "However, when these provisions [Secs. 4 and 402(k) (§ 1342(k))] are read together, it is not altogether clear what effect is intended with respect to pending Federal court suits against polluters violating the Refuse Act of 1899.
>
> If section 402(k) were read as having retroactive effect, then about 170 Federal suits filed against polluters prior to the date of enactment of the bill, including the Reserve case, could be dismissed.
>
> It is true that the suit against Reserve Mining is also based upon violations of water quality standards and the allegation that such dumping constitutes a public nuisance. However, the strongest part of the case is based on the Refuse Act.
>
> * * *
>
> [I]t is inconceivable that the Senate would want to emasculate the best available enforcement device now available—the Refuse Act—and legislatively dismiss suits pending under it." *Legislative History* at 191.[3]

Senator Muskie replied as follows:

> "Section 4 provides and I quote the relevant words pertaining to the Refuse Act:
>
> > No suit, action, or other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity . . . shall abate by reason of

[3] All citations to the legislative history are to "A Legislative History of the Water Pollution Control Act Amendments of 1972," prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (Committee Print 1973).

> the taking effect of the amendment made by section 2 of this Act.
>
> Without any question it was the intent of the conferees that this provision include enforcement actions brought under the Refuse Act, the Federal Water Pollution Control Act, *and any other acts of Congress.*" (Emphasis added.) *Id.* at 193.

This colloquy concluded as follows:

> "Mr. Griffin. I thank the manager of the bill. Certainly that does clarify the meaning as to the intent of the conferees, and it would clearly indicate that the suit now pending against the Reserve Mining Co. *under the Refuse Act* would not be affected by this bill." (Emphasis added.) *Id.* at 194.

Simultaneously, the following statement was made by Representative Wright in the House:

> "Section 4 provides and I quote the relevant words pertaining to the Refuse Act:
>
> > 'No suit, action, or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity . . . shall abate by reason of the taking effect of the amendment made by section 2 of this Act.'
>
> Without any question it was the intent of the conferees that this provision include enforcement actions brought under the Refuse Act, the Federal Water Pollution Control Act, *and any other acts of Congress.*" (Emphasis added.) *Id.* at 248.

Note that the language of Senator Muskie's response is identical to the response of Representative Wright. Both were responding to a question relating to the effect of Sec. 402(k) on pending litigation under the Refuse Act of 1899. Both limited their response to the statement that Sec. 402(k) would not preclude continuation of pending litigation under the Refuse Act, the Federal Water Pollu-

tion Control Act or "any other acts of Congress." Neither mentioned the common law, much less the *federal* common law.

After Senator Muskie spoke, later that day Senator Hart paraphrased what Senator Muskie had said as follows:

> "Alarm has been voiced that efforts to prevent environmental damage to Lake Superior involving the discharge of taconite tailings by Reserve Mining Co., will be hindered by this legislation. It is my understanding, however, after the explanation of the Senator from Maine, that the suit now pending against the Reserve Mining Co., under the Refuse Act of 1899 will in no way be affected nor will any of the other counts under the existing Federal Water Pollution Control Act *or other law.*" (Emphasis added.) *Id.* at 211.

Thus, not only is the attribution to Senator Muskie incorrect, but the gravity of that incorrect attribution is multiplied significantly by both footnoting Senator Muskie's primary authorship of the Act and italicizing the phrase "other law" which is Senator Hart's phrase, not Senator Muskie's phrase.

Note that the Solicitor General's brief at 23 states:

> "In addition, the contemporaneous legislative debates and hearings demonstrate that Congress specifically focused on the *federal* "common law of water pollution abatement" (1 Leg. Hist. 688) and concluded that enactment of the Clean Water Act would not limit or preclude such suits." (Emphasis added.)

Here the word "federal" has been inserted to modify the phrase "common law of water pollution abatement." Milwaukee said in its initial brief that the entire legislative history failed to use that modifier. Thus, the insertion of the modifier "federal" to introduce the mischaracterization of the legislative history at page 24 of the Solicitor General's brief adds an element to the mischaracterizations which is cause for serious concern.

The Solicitor General's brief presents other misleading arguments. At page 7 it states:

> "No regulations exist, however, regarding the allowable discharge of viral and bacterial pathogens, fecal coliforms, or phosphorous and chlorine residuals."

The obvious purpose of this statement is to suggest that an interstice exists in FWPCA and the regulations thereunder which the federal common law should fill. In fact, the discharge permits issued to Milwaukee under FWPCA specifically address fecal coliforms, phosphorous and chlorine residuals, as well as various other parameters (e.g., BOD, suspended solids, pH, etc.) and thereby by reference thereto address pathogens. P.Ex. 62, 63 and 64, App. 371-454, Tr. 257. There is no interstice here.

Interestingly, this very same argument was advanced by Illinois in its May 10, 1979 Application for Rehearing and Suggestion for Rehearing In Banc to the Court of Appeals. There Illinois claimed that neither federal regulations nor the discharge permit limitations were designed to protect the public health. In response to that claim, *the EPA itself* came forward with an affidavit from Mr. Charles Sutfin, now Director of EPA's Region V Water Division, who drafted EPA's "secondary treatment" standards applicable to publicly owned treatment works. That affidavit shows that the pertinent federal regulations were designed to accomplish the removal or inactivation of pathogens in treatment plant effluent so as to protect the public health. See Response of Defendants-Appellants to Petition for Rehearing with Appendix, dated May 29, 1979, at Ap. 5-6. Similarly, the State of Wisconsin specifically addresses pathogen removal or inactivation when establishing NPDES permit limitations. *Id.* at Ap. 7-8. Finally, applicable Wisconsin water quality and treatment standards promulgated pursuant to FWPCA are expressly designed to protect the public health. Sections NR 102.02-102.03, 103.06, 110.23, 210.09, Wis. Adm. Code.

The Solicitor General's brief does go on to admit at the same page 7 that the matters which are before this Court on this Petition for Certiorari are covered by FWPCA. At footnote 15 on page 7, he specifically says:

> "Such overflows [from combined storm and sanitary sewers] must be covered by a permit and must comply with Sections 301(b)(1)(A) and 301(b)(2)."[4]

The Solicitor General's brief at 14-15 argues that the EPA believes that the federal common law is an important tool to advance the goals of FWPCA. But the Solicitor General fails to state that the EPA, which is committed by Sec. 201 of FWPCA (§ 1281) to fund the goals of the Act, is resisting to the utmost paying for any court-imposed requirements which exceed the requirements that the EPA or qualified states impose under FWPCA. Can the Solicitor General and the EPA have it both ways?

II. THE SOLICITOR GENERAL AGREES WITH MILWAUKEE IN THIS COURT'S CASE 80-12.

The Solicitor General's position in this case is contrary to statements made in his petition for certiorari in *Environmental Protection Agency, et al.* v. *National Sea Clammers Association, et al.*, No. 80-12, cert. granted October 20, 1980. There, in responding to the Court of Appeals' decision establishing an implied right of action under FWPCA, which action is not subject to the procedural requirements of Sec. 505, the Solicitor General stated at 15:

> "This focus [in FWPCA] on agency enforcement is undermined by the decision of the court of appeals. . . .

---

[4] The Solicitor General's brief at 8n.16 incorrectly asserts that Illinois has established a higher water quality standard for Lake Michigan than has Wisconsin. In fact, both states have established a water quality standard of "fishable, swimmable and drinkable." See Sec. NR 103.06, Wis. Adm. Code (and related Secs. NR 102.02 (3), (4) and (5), Wis. Adm. Code) and Ill. Water Poll. Control Bd. Rules and Regs. ch. 3, Part 206 (and related Parts 203 and 204, Ill. Water Poll. Control Bd. Rules and Regs.).

> Under the court of appeals' decision, even when EPA is diligently pursuing a court action against an alleged violator, a private litigant will be free to bring a second action, which may be in a different court because it is not subject to the venue requirements of the statutory provisions."

The general problem posed by the Solicitor General in *National Sea Clammers* is the same problem present in this case. Whether the authority of the "private litigant" to pursue the second action is implied from the provisions of FWPCA or is based upon the federal common law, the problem is the same. Were it not for the asserted availability of a sovereign immunity defense to a federal common law action, the Solicitor General would undoubtedly have included an objection to such an action in its petition in *National Sea Clammers*. Again the Solicitor General would have it both ways.

III. UNDER THE DOCTRINE OF PRIMARY JURISDICTION, THIS CASE SHOULD HAVE BEEN REFERRED TO THE EXPERT AGENCIES HAVING FWPCA AUTHORITY.

The Solicitor General argues against primary jurisdiction referral because (1) nuisance claims are within the conventional experience of the federal courts, and (2) this case does not call upon the special expertise of the EPA, relying principally upon *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). (Solicitor General's Brief at 29-30 n.40.) [5]

However, the District Court candidly stated that it did not understand the technical evidence. Pet. App. F-3 and 4. This is the very problem calling for referral.

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[5] Michigan's brief also addresses primary jurisdiction at 19-20.

Nader v. *Allegheny Airlines, Inc., supra* at 303-304, is not dispositive. There the Court stated:

> "Even when common-law rights and remedies survive . . . it may be appropriate to refer specific issues to an agency for initial determination where . . .
>
> > 'the limited functions of review by the judiciary [would be] more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.' *Far East Conference* v. *United States,* 342 U.S. at 574-575, 96 L.Ed 576, 72 S.Ct. 492.
>
> See also *United States* v. *Western Pacific R. Co., supra,* at 64, 1 L.Ed.2d 126, 77 S.Ct. 161, 426 U.S. at 303-304."

The Court went on to point out that in the *Nader* case (contrary to the situation here) the expertise of the agency involved would not be helpful in resolving the issues before the Court. 426 U.S. at 305-306.

As pointed out in Milwaukee's initial brief at 11, here Illinois had actual notice of, and could have participated in, the NPDES permit proceedings (including a public hearing) where all of the technical matters could have been heard and determined by the qualified expert administrative agencies specifically created for that purpose.

Even if those proceedings were not dispositive of the issues presented, the agencies' expert input, based upon an extensive record on the precise issues now before the Court (including whether the discharges did in fact affect Illinois, how serious any potential risk actually was, and whether the benefits of potential remedies justified the cost thereof) would have provided the specific expertise the District Court admittedly lacked on the issues it decided.

IV. NEW YORK ARGUES A CASE NOT BEFORE THE COURT.

The brief amicus curiae of the Attorney General of the State of New York is directed to an issue not before this Court. In its "Statement of Interest" New York exposes its true concern: "In *certain circumstances,* a federal common law public nuisance action may be the *only* path open to a state government which seeks to resolve an apparent interstate conflict." (Emphasis supplied.) N.Y. Brief at 1. The brief then offers a "hypothetical" fact situation involving toxic waste disposal. *Id.* at 1-2. The burden of the brief is to establish that the states retain the option of going to federal court to seek a remedy for an injury which an administrative agency acting under federal statutes does not address. *Id.* at 20. Thus, the New York brief is really addressed to the so-called "Love Canal" case. See the citations to *United States* v. *Hooker Chemicals & Plastics Corp., et al.,* Civil Action Nos. 79-987, 79-988, 79-989 and 79-990 (W.D.N.Y.) at page 9 of New York's brief.

"Love Canal" does not entail the discharge of "conventional pollutants" (BOD, suspended solids, fecal coliform and pH) by a publicly owned treatment works or other publicly maintained point source pursuant to and in accordance with a discharge permit issued in compliance with the provisions of the FWPCA. It is not, and should not be, incumbent upon Milwaukee to brief, argue and prevail in every imaginable hypothetical fact situation, regardless of the presence or absence of regulation or statute in the premises, in order to prevail in the present certiorari proceeding pending before this Court on a narrow issue under a specific statutory scheme.

A decision favorable to Milwaukee, limited as it should be to the issues before this Court, will in no way decide the so-called "hypothetical" fact situation argued by New York. In contrast to the "Love Canal" situation, we here deal with permittees under an all pervasive federal statute

and federal regulatory scheme directed to the precise matters before the Court. New York's case is not before the Court.

CONCLUSION

The briefs of the respondents' supporting amici add little if any illumination to the issues before the Court. In each instance they are calculated to advance a position of the writer in an area of the law or under a statute not presented here and not controlled by a decision directed to the relatively narrow issues that are presented. On this basis Milwaukee respectfully suggests that those briefs should be used only as guideposts to mark the outer perimeters of the issues before the Court and the limits of the decision rendered.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979
No. 79—408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

V.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE CITY OF DETROIT, AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The City of Detroit is a Municipal Corporation duly organized and existing under the laws of the State of Michigan and is located in the County of Wayne, State of Michigan, with a substantial interest in the questions presented for review.

The City of Detroit, through its agency the Detroit Water and Sewerage Department (DWSD) has the responsibility for the operation and maintenance of a sewerage system and for the operation and maintenance of wastewater treatment facilities.

The State of Michigan, in 1974, pursuant to authority granted by the United States Environmental Protection Agency (EPA) under Section 402(b) of the FWPCA, 33 U.S.C. 1342 (b) issued a discharge permit to the City of Detroit which established specific requirements for sewage effluent discharges from the City's wastewater treatment plant.

The City of Detroit has, in recent years, been engaged in litigation with the United States Environmental Protection Agency (EPA) and the State of Michigan, Michigan Department of Natural Resources (MDNR) relevant to its conformance with federal and state water pollution control requirements. Effective on September 9, 1977, the parties entered into a Consent Judgment which, mandated compliance by the City of such matters as financial user charges, industrial cost

recovery, local capital cost funding systems, industrial waste control, staff training, secondary treatment, removal, effluent limitations, reporting and other requirements. Specific dates for compliance are spelled out in the Judgment. **United States of America v. City of Detroit**, et al., 476 F. Supp 512 (E.D. Mich 1979).

The DWSD provides three principal types of service to the City of Detroit and the surrounding suburban areas: potable water supply, sewage collection and disposal, and storm drainage collection and disposal.

The sewerage system provides collection, treatment and disposal of wastewater generated within its service area. The DWSD Sewer System presently serves an area of about 650 square miles in Wayne, Oakland and Macomb Counties; about 62 percent of the total area is served by separate sewers. The 140 square miles in the City of Detroit are essentially all on combined sewers; there are about 100 square miles of combined sewers in Oakland and Wayne Counties, generally adjacent to the Detroit City boundaries. Wastewater is collected from both individual retail customers and 75 governmental wholesale customers outside the City of Detroit and conveyed, either by gravity flow or by pumping, to the Wastewater Treatment Plant.

The DWSD operates a regional treatment facility, 18 sewage pumping stations, regulating facilities and 3,000 miles of collectors and interceptors.

The federal question presented in the instant case is a matter of continuing importance to the City of Detroit with far-reaching implications on all Municipal Wastewater Treatment Facilities. Briefly stated, the Federal question includes: whether the federal statutory law is paramount to the federal common law and whether federal courts may issue pollution abatement orders without regard to costs and cost-effectiveness considerations.

Federal courts should not have the power to prescribe wastewater treatment standards far more stringent than the federal law. Nor should federal courts have the power to order pollution abatement without regard to costs and cost-effectiveness considerations. There should be uniform application of the federal pretreatment standards as Congress intended.

If strict parameters are not imposed on the federal courts application and development of the federal common law, municipalities will be faced with wastewater treatment obligations above and beyond those required by federal statutes and with enormous financial obligations for which federal financial assistance will not be available.

The interest of the City of Detroit is thus predicated on the substantial and far-reaching consequences that any decision here may have for the abatement of pollution.

For these reasons, the issues here go far beyond the interests of the principal parties.

STATEMENT OF THE CASE

We respectfully refer the Court to the Citation of Opinions Below, the Statement of Jurisdiction, the Citation of Statutory Provisions Involved, and the Statement of the Case presented in the Petition for Writ of the City of Milwaukee, et al. filed with the Court in this proceeding.

The City of Detroit, by its Corporation Counsel respectfully submits this Brief Amicus Curiae, in support of Writ of Certiorari of the City of Milwaukee, et. al, pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Does the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act of 1977, control the abatement of water pollution?

2. If the Federal Common Law of nuisance survives the FWPCA, strict parameters on its use and development by lower courts must be set.

SUMMARY OF ARGUMENT

In **Illinois v. Milwaukee**, 406 U.S. 91 (1972), this Court fashioned federal common law with respect to pollution of interstate waters. The Court did so because the remedy sought by the complaining party was not within the scope of remedies provided by the federal statute existing at that time. Application of the federal common law was not considered inconsistent with the FWPCA since the Act was neither comprehensive nor was it effective. However, the Court stated that the federal common law could be preempted by new federal law and regulations if that legislation were comprehensive.

> It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance...**Id.** at 107.

Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with claims as alleged federal rights. **Id.** at 107 n.9.

Congress subsequently enacted new legislation, specifically the FWPCA Amendments of 1972 and the Clean Water Act of 1977. Congress designed this comprehensive federal statute to provide a uniform national program for the abatement of water pollution by means of federally mandated effluent limitations governing the discharge of pollutants. This substantially amended the previous Act which required states to set water quality standards.

Congress in Sections 101(b) and 510 of the Act preserved the right of the individual states to impose more stringent pollution control standards intrastate. However, states are not allowed to impose stricter standards on neighboring states.

The enactment of this comprehensive legislation in the area of water pollution control should fill the gap perceived by this Court in **Illinois v. Milwaukee, supra.** This Court has found the existence of comprehensive legislation precludes courts from applying federal common law. **Arizona v. California,** 373 U.S. 546 (1963).

Lower courts have read **Illinois v. Milwaukee, supra,** as authority to apply federal common law to interstate and sometimes intrastate pollution problems despite the enactment of new federal statutes and regulations. Some courts have failed to recognize this issue. Other courts have recognized the issue but have been unwilling to find that the

1972 Amendments or the Clean Water Act of 1977 have preempted the federal common law. The courts have not wished to disturb this Court's decision in **Illinois v. Milwaukee** because the question of preemption has been clouded or overlooked in favor of applying federal common law. The opinions of the lower courts indicate a need for direction on this issue.

The federal statute controls the area of abatement of water pollution. If dischargers are required to remain subject to suits based on federal common law, the intent of Congress to provide a uniform comprehensive program for the elimination of water pollution will be undermined. Courts with limited ability and resources to make intelligent scientific determinations regarding pollution control will be allowed to fashion relief and set standards beyond that anticipated under the Act. Continuous major adjustments will be made to a statutory scheme designed and enacted to insure uniform control and abatement of water pollution.

The State of Illinois asserts that there is no preemption of more stringent requirements than those imposed under the 1972 Act and cites Section 510 of the Act. Section 510 allows a state to impose stricter standards of effluent discharge than those set by EPA within that state. However, the FWPCA does not allow a state to impose its stricter standard on pollution in another state. That Section 510 only permits state control of intrastate pollution is re-

flected in provisions of the section itself. Section 510 is not applicable to this case since it involves interstate pollution. Section 510 also makes it clear that within the minimum standards, there is no preemption of State law. However, the issue in this case is not preemption of state law but whether the federal statute controls in the field of water pollution such that there is no longer a need for federal common law.

The State of Illinois also asserts that Section 505(e) expressly saves all common law actions. However, the intent of Congress to include federal common law is not clearly expressed on the face of the statute. Section 505 read as a whole seems to permit citizens to sue for violations of established water pollution requirements. It also permits courts to award to citizens, actual damages under other legal theories proven and that can be proven - an area not covered by the Act. The legislative history clearly indicates that Section 505 does not substitute a common law or court-developed definition of water quality (**Legis. Hist.** 1497). Section 505(e) does not preserve federal common law water quality standards. Citizen suits are limited to enforcement of established standards, the same standards enforceable under administrative enforcement procedures. (**Legis. Hist.** 1498) Citizen suits are designed to supplement administration action, not to provide new standards. S Rep 92-414, 92nd Cong. 1st Sess., in 2 U.S. Code Cong. & Ad. News 3668, 3745-46 (1972).

General federal common does not exist. **Erie R. Co. v. Tompkins,** 304 U.S. 64 (1938), although courts may create it to fill statutory interstices. **Textile Workers Union of America v. Lincoln Mills,** 353 U.S. 448 (1957). It is therefore arguable that Congress intended Section 505(e) to apply only to state common law remedies and not federal common law remedies. **Committee for Jones Falls Sewage System v. Train,** 539 F. 2d 1007, 1009 n9 (4th Cir. 1976). There is no evidence Congress intended Section 505(e) to be a mechanism by which a district court judge could set interstate water quality standards apart from the Act itself. The legislative history indicates otherwise. The clear intent of Congress was the enactment of a comprehensive federal statute governing abatement of pollution in the nation's waters.

The Court below held that despite Congress' enactment of the 1972 and 1977 Acts which contain no provision expressly prohibiting "combined sewer overflows", Milwaukee must eliminate all overflows outside its combined sewer system by July 1, 1986 and construct a collection and conveyance system for the combined sewer system that will eliminate overflows on the combined sewer system by December 31, 1989.

If courts are allowed to fashion common law relief without regard to cost and cost effectiveness and order abatement above and beyond that provided by Congress, municipal wastewater treatment plants with pollution control plans made in reliance on the federal statute will be in constant jeopardy, facing dramatically different wastewater treatment requirements with no expectation of federal financial assistance.

It is clear, Congress recognized federal financial assistance and the consideration of costs are important elements in resolving the water pollution problems.

The Congressional statement of policy in the 1972 Act, provides: "It is the National Policy that Federal financial assistance be provided to construct publicly owned treatment works. Sec. 101(a) (4) (1251 (a) (4))

The 1977 Act requires "any guidelines for cost effectiveness analysis published by the administrator under this title shall provide for the identification and selection of cost effective alternatives to comply with the objective and goals of this Act...." Clean Water Act Section 217, 33 U.S.C. 1297 (1977).

The intentions of Congress are thwarted if courts are allowed to fashion relief without consideration of the policies and standards set by the FWPCA. If guidelines for the use and development of the federal common law nuisance with respect to water pollution are not established, the potential for injury to parties relying on the federal statute is very grave in terms of costs, cost effectiveness and federal grant funding.

ARGUMENT

I. The City of Detroit Water and Sewerage Department (DWSD), as amicus curiae, supports the position taken by the City of Milwaukee that the Federal Water Pollution Control Act as amended by the Clean Water Act of 1977 controls the abatement of water pollution.

A. Comprehensive legislation, embodied in the Federal Water Pollution Control Act, obviates the need for federal common law of nuisance.

This Court in **Illinois v. City of Milwaukee**, 406 U.S. 91 (1972), perceived a need to fashion federal common law with respect to pollution of interstate waters in a situation where the remedy sought by the complaining party was not within the scope of remedies provided by the federal statute as it existed at that time. When this Court decided that case, neither the

1972 amendments to the Federal Water Pollution Control Act (FWPCA) nor the Clean Water Act of 1977 had been enacted by Congress. This Court noted that the procedure for abatement of water pollution at that time was long and drawn out. States were required to establish ambient water quality standards. If a state failed to do so, the EPA administrator would establish the standards. A conference procedure was used, with final action on the part of the administrator being a request to the Attorney General to bring suit on behalf of the United States for the abatement of water pollution.

Application of federal common law to abate a public nuisance in interstate water was not considered inconsistent with the FWPCA by the Court. However, this Court noted that the federal common law they had fashioned could be pre-empted by new federal laws or regulations.

> It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution. **Illinois v. Milwaukee,** 406 U.S. 91, 107 (1972).

Application of federal common law to abate a public nuisance in interstate water was not considered inconsistent with the FWPCA by the Court. However, this Court noted that the federal common This Court added:

> Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with claims as alleged federal rights. **Id.** at 107 n.9.

Congress, by the enactment of the 1972 amendments to the FWPCA (PL 92-500) and the Clean Water Act of 1977 has addressed the concerns expressed by this Court in **Illinois v. Milwaukee, supra.** A comprehensive federal statute was designed to provide a uniform national program to abate water pollution.

The lack of uniformity in the old Act was of particular concern to the Congress.

> ....there are three essential elements to it: Uniformity, finality and enforceability. Without these elements a new law would not constitute any improvement on the old: We would not bring a conference agreement to floor without them. **Legislative History,** 162 fn

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fn....All citations to the legislative history are to "A Legislsative History of the Water Pollution Control Act Amendments of 1972," prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (Committee Print 1973).

The Congress also responded to the haphazard manner in which water pollution had been previously handled.

> Water pollution control in the past has all too often been sporadic, inconsistent and improvised on an ad hoc basis. The major purpose of this legislation is to establish a comprehensive long-range policy for the elimination of water pollution, making it clear to industry and municipalities alike the pollution control performance which will be expected over the next decade. 2 **U.S. Code Cong. and Ad. News** 3758 (1972)

The thrust of Congressional action was changed from an act requiring states to set water qualiity standards to federally mandated effluent limitations on the discharge of pollutants. This is reflected in the Act's Declaration of Goals and Policy:

> Sec. 101(a) The objective of this Act is to restore and maintain the chemical, physical and biological integrity of the Nations's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act_____

(1) it is the national goal that the discharge of pollutants into the navigable water be eliminated by 1985....fn

Section 101(b) and Section 510 of the Act preserve the rights of the states to prevent and eliminate pollution and to impose more stringent pollution control standards. Management of construction grant programs under the Act is also placed in the hands of the states.

In this way Congress chose to allow the states room to provide for stricter standards than the minimum effluent limitations set by the enforcing agency. It also provided for "citizen suits" under Section 505 of the Act. However, Congress did not intend for states to impose their individually enacted stricter standards on neighboring states.

The enactment of this comprehensive legislation governing abatement of water pollution, coupled with the enforcement procedures included in the Act, leaves no room for courts to continue to fashion equitable remedies based on federal common law. The void recognized by this Court in **Illinois v. Milwaukee, supra,** has been filled.

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fn The Federal Water Pollution Control Act, as amended, is codified in 33 U.S.C. 1251 et seq. Hereinafter it will be referred to as "the Act" or "FWPCA".

This Court found that comprehensive legislation precludes courts from applying federal common law in **Arizona v. California,** 373 U.S. 546(1963). In that case a comprehensive scheme for allocation of waters of the Colorado River among the states had been created by Congress. That scheme was held to preclude fashioning of relief based on common law. This Court wrote:

> Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notion of an "equitable apportionment" for the apportionment made by Congress. (**Id.**, at 565)

This is precisely the situation this Court in **Illinois v. Milwaukee** addressed with regard to eventual preemption of federal common law by new federal statutes governing water pollution control.

However, lower courts have failed to recognize this issue and have read **Illinois v. Milwaukee, supra** as authority to apply or invent federal common law despite the enactment of new federal statutes and regulations. At least one court seems to have recognized this as the issue, and applied federal common law only because the new Act had not yet been effectuated. In **United States ex rel Scott v. U.S. Steel Corp,** 356 F. Supp. 556 (N.D. Ill 1973), the Court spoke to the issue of whether the FWPCA as amended "completely occupied the field and ousted this court from common law jurisdiction." (**Id.** at 558-559). The Court noted that the amendments became effective twelve days after the filing of **Scott,** and stated:

> At least until the Environmental Protection Agency has acted effectively, the hands of the plaintiff governments are not tied. **U.S. ex rel Scott v. U.S. Steel Corp. supra,** at 559.

However, that Illinois District Court refused to find the new federal law preempted federal common law because the Act did not specifically so state. Instead the court stated the intention of the statute to "supplement and amplify any preexisting remedies." (**Id.** at 559)

Other courts have not felt the decision of this Court in **Illinois v. Milwaukee, supra,** establishing federal common law in this area, could be disturbed. Many have chosen not to address the Court's remark regarding possible preemption.

Most recently, in **California Tahoe Regional Planning Agency v. Jennings,** 594 F. 2d 181 (9th Cir. 1979), cert. denied No. 79-15 (Oct 1, 1979), the Ninth Circuit correctly interpreted that **Illinois v. Milwaukee, supra,** held that the FWPCA had not yet occupied the field and noted that courts continued to hold thus even after the 1972 amendments. The Ninth Circuit declined the invitation to reach a different conclusion. (**Id.** at 193).

Similarly the New Jersey District Court in **Township of Long Beach v. City of New York,** 445 F. Supp 1203 (D.N.J., 1978), was faced with the question of whether the 1972 amendments effected the preemption issue set forth in **Illinois v. Milwaukee.** The New Jersey Court noted that in at least two cases which held there was not preemption the new amendments had not yet been effected or regulations has not been adopted: **U.S. ex rel. Scott v. U.S. Steel Corp., supra,** and **Illinois v. City of Milwaukee,** 366 F. Supp 298 (N.D. Ill. 1973). At least one other court found it unwise to rely on federal nuisance law. **Reserve Mining Co., v. United States,** 514 F. 2d 492 (8th Cir. 1975). The New Jersey District Court, however, felt the need for clarification of the effect of the 1972 amendments on the preemption issue and wrote:

> At this time, I will therefore deny the motion to dismiss based on preemption without prejudice to a renewal thereof after further clarification to the nature of this suit, the new regulations and their effect on the preemption issue. (**Id.** at 1215)

Generally, the preemption issue has been clouded or overlooked in favor of applying the federal common law. The federal common law has been held applicable particularly with respect to interstate situations, and in some cases the issue of preemption was not addressed because the 1972 amendments had not yet

been enacted. See **United States v. Ira S. Bushey & Sons, Inc.**, 346 F. Supp 145 (D.Vt.1972) aff'd. mem. 487 F. 2d 1393 (2nd Cir. 1974), cert. denied 417 U.S. 976 (1974) **U.S. v. Stoeco Homes,** 498 F. 2d. 597 (3rd Cir 1974), cert. denied, 420 U.S. 927 (1975).

In **Committee for Jones Falls Sewage System v. Train,** 539 F. 2d 1006, 1007 (4th Cir. 1976), the Court found there was no body of federal common law which conferred rights upon private citizens to enjoin intrastate pollution which was not enjoinable under the FWPCA Amendments of 1972. The Fourth Circuit noted that the federal common law governing water pollution was fashioned to resolve interstate pollution controversies. Finding the controversy in that case to be purely local, the Court stated that Maryland law was adequate to govern the situation. With respect to any federal interest, the Fourth Circuit noted that it was expressed through the FWPCA Amendments of 1972.

> To the extent there is a federal interest, it is expressed in the Federal Water Pollution Control Act Amendments of 1972, but the plaintiffs have no claim based upon that statute. (**Id.** at 1009)

The Fourth Circuit explained that the federal common law of nuisance had not been extended beyond abatement of public nuisance in interstate controversies involving "extra-territortal harm" (**Id.** at 1009). The Court, however, noted that in **U.S. ex rel Scott** there was no allegation of any interstate effect. Citing other cases which upheld the federal common law concept, the Fourth Circuit noted:

> The question is not before us, but the proposition of these cases may be questionable now that the 1972 Amendments of the Federal Water Pollution Control Act are effective. (**Id.** at 1009 n7)

Finally, the Fourth Circuit stated with respect to federal common law:

> Indeed, it would be an anomaly to hold that there was a body of federal common law which proscribes conduct which the 1972 Act of Congress legitimates.....
>
> While the state courts are free to apply state nuisance law more rigidly, a federal court in such a local controversy may not turn to a supposed body of federal common law to impose stricter standards than the statute provides. (**Id.** at 1009)

While the Fourth Circuit spoke only to a local controversy, the City of Detroit, as **amicus curiae**, submits that it would be an anomaly to hold that there is a body of federal common law which proscribes conduct which the 1972 Act of Congress legitimates in an **interstate** controversy. The Court in **Jones Falls** is correct that state courts may apply more rigid standards under a state nuisance law and federal common law should not govern. It is also correct that states may apply their more rigid standards **intrastate** but may not use federal common law to apply their more rigid state standards to neighboring states which have not promulgated such rigid standards, even if an interstate body of water is involved.

The federal statute controls the area of pollution of navigable national waters. If a discharger remained subject to suits under a theory of federal common law applied by the courts, the intent of Congress to provide a uniform, comprehensive program for abatement of water pollution would be forever lost to case by case determinations by courts not dissimilar from the lower court in this case, where the Judge clearly recognized the limits of his ability to make an intelligent scientific determination regarding abatement of water pollution.

The question of whether the FWPCA amendments of 1972 and the Clean Water Act of 1977 control the field of abatement of water pollution including interstate controversies has not been specifically addressed by this Court. **Illinois v. Milwaukee,** 406 U.S., 91 (1972) may be construed as inviting Congress to take new steps to more effectively legislate the abatement of water pollution. The language of that opinion seems to suggest the willingness of this Court to allow the legislative branch the opportunity to enact laws that would have the effect of preempting the federal common law, which is a special and extraordinary remedy. That attitude of this Court is given further support by its opinion in **Arizona v. California, supra,** where this Court refused to fashion law where Congress had made a firm legislative decision regarding the matter.

The lower courts have misconstrued the intention behind the fashioning of federal common law in **Illinois v. Milwaukee, supra.** Recent decisions cite the existence of federal common law with reference to cases decided **before** the advantage of effective federal legislation. No court has been confident enough to decide the questions of preemption even though the question has been recognized. **Comm. for Jones Falls Sewage System v. Train, supra; California Tahoe Regional Planning Agency v. Jennings, supra; Township of Long Beach v. City of New York, supra; United States ex rel. Scott v. U.S. Steel Corp., supra.**

Direction is needed from this Court. Municipalities and governmental agencies should not be put into a position of compliance with a federal statute only to be sued on a theorty of federal common law nuisance, and held to a level of pollution compliance beyond that set by federal statutes and accompanying regulations. The effect of such a situation would be continuous major adjustments to a statutory scheme enacted to insure uniform control and abatement of pollution in the nation's waters.

B. Section 505 of the FWPCA does not preserve a right to sue under federal common law for water discharge standards apart from the Act itself.

The State of Illinois argues that there is no preemption of more stringent requirements than those imposed under the 1972 Act by pointing to Section 510 of the Act. Clearly, that section does allow a state to impose standards for effluent discharge stricter than those set forth by the EPA **within that state.** In an effort to balance state autonomy with the growing need for a uniform, federal program for the abatement of water pollution, Congress has allowed states to control, with minimum federal standards, effluent discharge within each state. However, nowhere in the FWPCA does Congress permit a state to establish and impose stricter standards on pollution occurring in another state. Section 510 is clearly not applicable to the case

before this Court. It merely allows a state to control intrastate pollution. This case involves interstate pollution. It is irrelevant to assert that Illinois could have more stringent effluent limitations; it is irrelevant to inquire whether Illinois did have more stringent effluent limitations. These are questions of state law, which the Supreme Court, in **Illinois v. Milwaukee,** 406 U.S. 91, 102 (1972) found inapplicable in such a situation as interstate pollution.

Respondent State of Illinois infers, however, that since Congress allowed stricter standards in Section 510 that suggests an intent to allow stricter standards in all circumstances, including interstate pollution. However, Congress made it clear that Section 510 is limited to intrastate pollution when it included in that Section the statement that "nothing in this Act shall....(2) be construed as imparing.....any right or jurisdiction of the States with respect to the waters (including boundary waters) of such states." Surely, Section 510 is part of the Act, and therefore cannot be used by one State to impair the rights of another. Section 510 can be seen, therefore, as allowing stricter intrastate standards, as a Congressional recognition of state autonomy. However, there is no explicit or implicit intent to allow standards which differ from those set forth in the Act when interstate pollution is involved.

It must be made clear that this case is not concerned with federal pre-emption of state law; Section 510 clearly indicates that within minimum standards, there is no such pre-emption. The issue is whether federal statutory law controls the field of water pollution law, or whether there is still a need for federal common law. Illinois argues that Section 505(e) of the Act expressly saves all common law actions. That Congress meant to include federal common law actions is not clearly expressed on the face of the statute.

But the thrust of Section 505 (which must be read as a whole) seems to permit citizens to sue for violation of established water pollution requirements, and to be awarded damages under other legal theories that can be proven. But, as the Senate Report remarked, "Section 505 would not substitute a 'common law' or court-developed definition of water quality." (**Legis. Hist.** 1497) The common law, as preserved by 505(e), would allow recovery of actual damages, an area not covered by the Act. However, 505(e) does not preserve federal common law water quality standards, since those are provided for in the Act. Further comment in the Senate Report supports this analysis: "(T)he section would specifically preserve any rights or remedies under any other law. Thus, if **damages could be shown**, other remedies would remain available." (**Legis. Hist.**, 1499) (Emphasis added) However, the standards would remain the same.

"The standards for which enforcement would be sought either under administrative enforcement or through citizen enforcement procedures are the same." **(Legis. Hist.** 1498.) Since, as the legislative history makes clear, citizen suits are limited to enforcement of established standards, it would be illogical to read Section 505(e) as allowing suits to establish new standards.

Elsewhere in the Senate Report it is clearly stated that citizens' suits were designed to **supplement** administrative actions to abate violations of the Act, not to provide new standards. S Rep 92-414, 92nd Cong. 1st Sess., in 2 U.S. Code Cong. & Ad. News 3668, 3745-46(1972). During hearings before the House Committee on Public Works regarding House Bill 11896, which eventually was combined with Senate Bill 2770 to form PL 92-500, Russell Train, Chairman of the Council on Environmental Quality, testified that "We felt it very important that citizen's suits be directed towards enforcing standards set by law and regulatons, rather than hypothetical standard which are not related to statutory and regulatory enactment." (**Legis. Hist.** 1153) Section 505 does not anticipate creation of a new set of standards for each suit, but merely permits citizens to sue for damages and/or enforcement of pre-existing standards. Section 505(e) must be

read consistantly with the entire section, as preserving common law actions that would also provide for damages and/or enforcement of pre-existing standards. Respondent State of Illinois asserts that a common law nuisance is not a statutory action brought under 505; but is an action preserved by 505(e), which speaks of common law. General federal common law does not exist (**Erie R. Co. v. Tompkins,** 304 U.S. 64 (1938)); although, federal courts can create it to fill statutory interstices (**Textile Workers Union of America v. Lincoln Mills,** 353 U.S. 448 (1957)), it is arguable that Congress did not intend Section 505(e) to apply to **federal** common law, but only state common law. This was the view of the Fourth Circuit in **Committee for Jones Fall Sewage v. Train** 539 F.2d. 1007, 1009 n9 (4th Cir. 1976). At most, Congress could have intended 505(e) to preserve the federal common law that filled those statutory interstices, in the FWPCA, such as actions for damages. There is no evidence that the legislature felt 505(e) was a source of interstate water quality standards, to be set by a district judge, apart from the Act itself; indeed, as set forth above, the legislative history indicates otherwise. This is consistent with the structure of our federal government: Congress is the factfinding body, not the judiciary, in areas of federal concern, such as interstate pollution.

II. IF THE FEDERAL COMMON LAW OF NUISANCE SURVIVES THE FEDERAL WATER POLLUTION CONTROL ACT, AS AMENDED, STRICT PARAMETERS ON ITS USE AND DEVELOPMENT BY LOWER COURTS, INCLUDING COST EFFECTIVENESS CONSIDERATIONS MUST BE SET.

A. Lower courts must be guided by the policies of the FWPCA and must consider and weigh reliance on the Act and good faith efforts to comply with standards set by the Act.

Strict parameters on the use and development by the lower courts, of the federal common law of nuisance must be set if this Court finds the FWPCA does not preempt the field of abatement of water pollution. Consideration must be given to municipalities and governmental agencies that rely on standards set pursuant to the FWPCA and make good faith efforts to comply with those standards.

Nuisance, as applied in the lower courts is primarily an action to protect one's property rights when they are invaded by the alleged misconduct of another. The reasonableness of the alleged misconduct must be weighed against the importance of the property rights seeking protection. Consideration must also be given to the potential for injury or inconvenience to the defendent party along with action taken by the defendant to limit the damage to property rights.

Courts fashioning relief based on federal common law as applied to the abatement of water pollution have recognized the necessity for some standard. In **Township of Long Beach v. City of New York, supra,** the New Jersey District Court stated:

> The absence of special injury also is said to bar both the federal and state common law nuisance claims. (**Id.,** at 1215.)

This would seem to imply that some special injury be required to trigger principles of federal common law nuisance. This is in line with the established policy that federal common law relief is an extraordinary remedy.

Courts should also be required to consider the policies and standards set by the FWPCA when a case is brought on the federal common law theory. Judge Butzner, dissenting in **Committee for Jones Falls Sewage System v. Train, supra,** stated:

> In developing the federal common law of water pollution, the district courts may draw on the policies expressed in the 1972 Amendments, other federal legislation such as the Rivers and Harbors Acts of 1899, principles of the federal common law of nuisance, and applicable state laws. (**Id.,** at 1014) (Citation omitted)

This Court should go further and mandate the the lower courts focus attention on the policies and requirements of the FWPCA which Congress fully intended to govern this area. Without such attention courts may be allowed to fashion remedies and set standards without the benefit of the legislative fact finding authority and expertise available under the FWPCA through the Environmental Protection Agency.

The intention of Congress to enact uniform and comprehensive legislation for the eventual elimination of water pollution is undermined if courts are allowed to fashion relief above and beyond that provided by the Congressional scheme. Moreover, municipalities and governmental agencies with pollution control plans made in reliance on the federal statute will be in constant jeopardy of court ordered relief dramatically different from that anticipated under the Act, if this Court does not impose guidelines for the development of the federal common law. The potential for injury to a party relying on the federal statute is very grave especially in terms of costs.

B. The decision of the Court below requiring total elimination of combined sewer overflows without regard to costs, cost effectiveness and funding considerations contravenes the congressional intent.

That Congress recognized federal financial assistance would be necessary to correct the problems of water pollution is clearly stated in the Congressional statement of policy in the 1972 Act:

> "It is the National policy that Federal financial assistance be provided to construct publicly owned waste treatment works ....."
> "Sec. 101(a)(4) (1251(a)(4))

In the 1977 amendments to the 1972 Act Congress further recognized the need to provide for extensions of time to meet the requirements of the 1972 Act where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations....., but (A) Construction cannot be accomplished within the time frame.... or (B) the **United States has failed to make financial assistance under this Act available** in time to achieve such limitations.....", the EPA administrator or if appropriate the State may extend the compliance date to July 1, 1983. Sec. 301(i) 33 USCA Sec. 1311(i) (Emphasis added)

Congress, cognizant of the fact that federal financial assistance would be required, and that consideration should be given to cost effectiveness, directed the administrator of EPA to submit a report to the Congress including "(B) a detailed estimate biennially revised, of the cost

of construction of all needed publicly owned treatment works in all of the states and of the cost of construction of all needed publicly owned treatment works in each of the states; "(C) a comprehensive study of the economic impact on affected units of government of the cost of installation of treatment facilities;...." Sec. 516(b), 33 U.S.C. 1375 (b).

In addition, with regard to combined sewer overflows, Congress further directed the study include:

> (3)an estimate for each applicable municipality of the number of years necessary, assuming an annual authorization and appropriation for the construction grants program of $5,000,000,000, to correct combined sewer over flow problems", and
>
> (5)an analysis of the technological alternatives available to municipalities to correct major combined sewer overflow problems." Id.

The District Court in the **United States v. City of Detroit, et al,** 476 F. Supp 512 (E.D. Mich., 1979) also recognized that the problems of water pollution cannot be solved without regard to costs and the availability of federal financial assistance. In that case, the State of Michigan and its municipalities was threatened with loss of fiscal year 1976 federal grant funds of approximately $400 million dollars for failure to achieve certain requirements as mandated by the 1972 Act. The Court issued an order restraining the United States Environmental Protection Agency from re-allocating such funds to any other state and to reserve a portion of said monies for the City of Detroit.

Further, in this same case, following the issuance of an Order to Show Cause in October of 1978, against the City of Detroit for violations of the Consent Judgment, the Court declined to give the United States its requested relief of fines and penalties, finding that the same would be "counter-productive". However, following extensive hearings, the Court found that the City of Detroit, not withstanding substantial achievements, had not complied with certain requirements of the Consent Judgment and the federal law regarding abatement of water pollution. The Court appointed an Administrator of Operations to manage and control the wastewater treatment plant and ordered a full scale plant evaluation to be held during the

summer of 1979 in order to determine that the Consent Judgment should be amended and this was done. The Amendmended Consent Judgment recognizes the need for federal assistance and considers cost-effectiveness in fashioning the remedy. In particular, with regard to combined sewer overflows the Judgment requires a program for the attainment of "control" of overflows rather than "elimination" in a cost-effective manner.

The Amended Consent Judgment creates an Interagency Group comprised of representatives of the several agencies "whose sole purpose is to provide a forum for coordination between the parties and for expediting any action necessary for compliance, regarding planning, construction, operations, **funding**, review and approval....." (Emphasis added). Thus, the district court in the sixth Circuit expressed its indication that Detroit's mandated obligation to comply with the Act and the Consent Judgment is tied to considerations of costs effectiveness and federal grant funding.

In a recent report prepared by the General Accounting Office (GAO) for Senator Charles Percy it was recommended that the Clean Water Act be amended to allow a more cost-effective solution to the problems of sewage pollution of the U.S. waterways. See 10 **Environ Rep. Current Developments** 1822-1823 (1-11-80).

CONCLUSION

The judgment of the court of appeals insofar as it concludes that the FWPCA does not preempt the federal common law of nuisance and, insofar as it preserves a right to sue, based on Section 505 of the FWPCA, under federal common law for water standards different from those set by the Act and, insofar as it orders relief above and beyond that provided by the Act and without regard for costs, cost effectiveness and funding considerations, should be reversed.

Respectfully Submitted,

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CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

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Respondents.

BRIEF OF THE ILLINOIS STATE CHAMBER OF COMMERCE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS, CITY OF MILWAUKEE, ET AL.

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In The

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Respondents.

BRIEF OF THE ILLINOIS STATE CHAMBER OF COMMERCE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS, CITY OF MILWAUKEE, ET AL.

INTEREST OF AMICUS CURIAE

The Illinois State Chamber of Commerce ("State Chamber") is a not for profit corporation with a membership of approximately 20,000 members and 6200 firms. These companies represent a cross-section of the Illinois economy, including manufacturing, agriculture, finance, transportation, the professions, and the service industries.

The goals of the Illinois State Chamber are to maintain a sound economy and a healthy environment. On behalf of its members the Illinois State Chamber has strongly supported an environmental protection program for Illinois to achieve these goals. Our organization has been directly involved in the Illinois environmental protection program for ten years. The Illinois State Chamber also participated as a proponent in the debates surrounding the "economic impact" amendment to the Illinois Environmental Protection Act. That provision mandates that, before any new environmental measure is adopted for the State of Illinois, the Illinois Pollution Control Board must consider whether the potential economic harm to the people of Illinois that could result from a proposed statute or regulation would outweigh its environmental benefits. Ill. Rev. Stat., ch. 111 ½ §1027 (b); *see Illinois State Chamber of Commerce* v. *Pollution Control Board,* 67 Ill.App.3d 839, 384 N.E.2d 922 (1st Dist. 1978) *aff'd,* 78 Ill. 2d 1 (1979).

The Illinois State Chamber has cooperated with the Illinois Pollution Control Board, the Illinois Institute of Natural Resources, and the Illinois Environmental Protection Agency in order to assure that technologically feasible and economically reasonable pollution control standards were promulgated. We have worked with these state agencies to achieve environmental objectives with necessary business safeguards. The Illinois State Chamber has contributed to the necessary legislation and regulations for delegation of federal environmental control authority to Illinois, including the National Pollutant Discharge Elimination System, the New Source Performance Standards, and the State Implementation Plan under the Clean Air Act. The State Chamber also served

on a task force dealing with hazardous waste disposal and toxic substances spills. With the Illinois Environmental Protection Agency and the United States Environmental Protection Agency, the State Chamber has sponsored statewide conferences on environmental control programs. The Illinois State Chamber is represented on the Illinois Policy Advisory Committee of the Illinois Environmental Protection Agency. We have continually demonstrated through our involvement in the issues of environmental regulation, our willingness to work toward solutions to environmental problems in a spirit of good faith and cooperation.

As a representative of the economic community of Illinois, the Illinois State Chamber's interests in this case reflect the diversity of its membership. Of general concern is the increased local tax burden that Illinois businesses would be asked to carry if a federal common law standard was added to the standards already applicable to municipal water dischargers under the Clean Water Act. Imposition of a common law standard would affect every establishment located in a municipality with a waste water treatment facility. Even if a business never used the publicly-owned treatment works to discharge industrial waste, it would be required to finance the additional costs of meeting a common law standard through a general tax assessment. Those establishments that use a publicly-owned treatment works as their waste-water disposal facility will be required to pay a proportionate share of the increased construction and operating costs of the treatment works to meet an effluent standard which coud be more stringent than that imposed by Congress. Direct dischargers to navigable waters, now subject to the requirements of categorical technology-based treat-

ment standards and the National Pollutant Discharge Elimination System permit program of the Clean Water Act, would face the uncertainty of meeting an additional or inconsistent standard determined by the federal district court, which could result in an unnecessary financial burden.

The Illinois State Chamber has sought to support the statutory and regulatory programs of environmental control in all its aspects: air, water and land. If this Court permits a common law of nuisance to be applied to environmental control standards in derogation of Congress' statutory scheme, we believe our efforts to balance the economy and the environment will be nullified.

CONSENT

We present this brief with the consent of all the parties, pursuant to Supreme Court Rule 42, on behalf of the Petitioners, City of Milwaukee, et. al. Copies of letters of consent have been filed with the Clerk of the Court.

QUESTION PRESENTED

Where the Congress has enacted a comprehensive scheme to protect the environment, should the federal courts have the authority to override that scheme by applying a federal common law of nuisance in the area of environmental control?

SUMMARY OF ARGUMENT

The environment has taken its place in the mainstream of political debates along with the economy, national security, taxes and welfare. Congress confronts environmental issues, and continues to review them in the light of national policy considerations. In the past ten years,

Congress has enacted more than ten major federal statutes to protect the environment. The major "federal pollution control" statutes specifically provide for resolution of interstate disputes and provide a federal forum for the complaining state. Because Congress has addressed the issues concerning the environment generally, and specifically the issues raised here by the Illinois Attorney General, and will continue as the forum for that debate, the imposition of a doctrine of federal nuisance presents a threat to Congress' constitutional authority to enact laws balancing competing interests. In this context, a federal common law of nuisance is not only unnecessary, and a usurpation of legislative power, it is also wasteful from a standpoint of judicial administration.

The issues surrounding the conditions of our nation's environment are complex. The national interest in a productive economy and reliable energy resources requires a delicate balance with environmental concerns. Control of environmental quality requires engineering, biological, chemical, economic, political and management skills. Federal agencies have been created to harness these disciplines to implement a national environmental protection scheme. Judicial review must be invoked to resolve disputes and in that role, the courts should take an active part in determining whether the agency has relied upon substantial evidence in making its decision and properly interpreted the statute. Although we believe the courts are often too deferential to agency decisions, the administrative process is quicker, less expensive and better suited for discussions, negotiation and initial resolution of these complex issues than is formal litigation. The courts must act as a procedural check on the agencies,

but should not supplant them, only thoroughly review them.

Federal courts should not be the forum for the creation of substantive environmental standards outside of the legislative mechanism. Review and enforcement of established standards is the proper role for the judiciary. As long as federal common law nuisance remains, given the ease with which a common law claim can be stated in the federal courts, a federal forum will become attractive to those complaining of pollution. By permitting this remedy, the federal courts will inexorably increase their own burdens, a situation which would further clog an already crowded federal court system.

ARGUMENT

THE COURT SHOULD HOLD THAT THE FEDERAL COMMON LAW OF NUISANCE HAS BEEN DISPLACED.

Congress has enacted complex and detailed statutes for environmental protection, including protection of neighboring states' interests, while recognizing competing societal interests. The function of the lower federal courts in these statutes is to review administrative actions and to enforce the requirements established by the U.S.EPA after they have become final. Notwithstanding these remedies, the lower federal courts have relied upon this Court's decision in *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), to consider whether regulated activities constitute a nuisance under federal common law. To allow the lower federal courts to apply the federal common law of nuisance permits the judiciary to create environmental standards independently of the statutory scheme. This is unwise as a matter of judicial policy and constitutes the unconstitutional usurpation of legislative power by the lower federal courts.

A. The Federal Common Law of Nuisance, A Judicially-Created Remedy, Is Displaced When Congress Enacts a Statute Applicable To The Case Or Controversy.

The doctrine of separation of powers prohibits the judiciary from usurping the essential authority of Congress.

The doctrine of separation of powers ascribes to each governmental department an exclusive function. To the judiciary belongs the interpretation and enforcement of the law; to the Congress, the embodiment of public pol-

icy in statutory schemes; and to the Executive, the administration of those schemes. This Court described the allocation of power, with reference to its earliest interpretation:

> While "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury* v. *Madison,* 5 U.S. 137, 177 (1803), it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies, mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.

TVA v. *Hill,* ..... U.S. ....., 98 S. Ct. 2279 2301 (1978). The doctrine preserves intergovernmental boundaries and enchances the exclusive authority of each department. To accomplish these ends the doctrine commands that each branch respect the distinctive provinces of the others.

Application of that approach requires Congress to defer to the judicial functions of interpretation and review, just as the courts must defer to the Congressional function of expressing public policy through statutory enactments. This Court has consistently refrained from substituting its judgment for that of Congressional drafters. In *Califano* v. *Goldfarb,* 430 U.S. 199 (1977), where eligibility classifications within the Social Security Act were challenged, the Court reasoned:

> Congressional decisions in this regard are entitled to deference as those of the institution charged under our scheme of government with the primary responsibility for making such judgments in light of competing policies and interests.

Id. at 210. With this rationale the Court has acknowledged that, in matters of public policy, the judiciary cannot encroach upon legislative authority.

Respect for Congressional decisions formed the basis for the Court's treatment of the statute attacked in *TVA* v. *Hill,* ..... U.S. ....., 98 S. Ct. 2279 ((1978). That controversy pitted the snail darter against the TVA's Tellico Dam project. The Court declined to impose its own judgment when Congress had plainly stated its priorities through the Endangered Species Act. In concluding that the doctrine of separation of powers required restraint where Congress had spoken, the Court stated:

> Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end . . . . [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "commonsense and the public weal." Our Constitution vests such responsibilities in the political Branches.

Id. at 2302-03. In this decision, the Court acknowledged that the priority stated in the Endangered Species Act was an expression of public policy within the exclusive control of the Congress. To maintain the basic structural integrity of the Constitutional design, the Court ruled, the judiciary may not impinge upon the policy-making activities of the legislative branch. *Id.*

A parallel judicial remedy cannot be invoked where Congress has enacted an applicable statute. This Court relied upon that principle when it resolved two controversies of peculiarly longstanding duration. *Mobil Oil Corp* v. *Higginbotham,* ..... U.S. ....., 98 S.Ct. 2010 (1978); *Arizona* v. *California,* 373 U.S. 546 (1963). The course this

Court followed to arrive at these decisions exemplifies its responsiveness to the voice of Congress. In each decision, the Court abandoned a traditional judicial remedy to enforce a federal statute.

The historic struggle of the southwestern states to allocate the waters of the Colorado River was presented to this Court in *Arizona* v. *California, id.* The states had initially attempted to distribute water rights through an agreement, the Colorado River Compact, negotiated in 1922. *Id.* at 557. The Compact failed to quiet the dispute. The states were unwilling to implement the Compact because of continued applicability of two judicial doctrines governing interstate water rights: prior appropriation and equitable apportionment. *See Wyoming* v. *Colorado,* 259 U.S. 419 (1922). The law of prior appropriation—"first in time, first in right"—would have given California the "lion's share" of the water. *Arizona* v. *California,* 373 U.S. at 558. The equitable apportionment rule was the Court's method of measuring the equities of interstate water allocation, and would have required some states to relinquish water to compensate shortfalls in other states. *Id.* at 562. Congress finally enacted the Boulder Canyon Project Act in 1928 to provide a method of apportioning water among the states. 43 U.S.C. §§617-617u. But the controversy did not end there. In 1952, Arizona filed a complaint in this Court against California for infringement upon its rights to water from the Colorado River. *See Arizona* v. *California,* 344 U.S. 919 (1953). The case was resolved ten years later when the Court had weighed the implications of the Boulder Canyon Propect Act. The Court found that Congress had created a comprehensive water apportionment plan. *Arizona* v. *California,* 373 U.S. 546, 565 (1963).

Observing the extensive control over water allocation exerted by the federal statute, this Court did not apply the judicial apportionment doctrines. In holding that the Project Act had displaced the common law remedies, the Court stated:

> Where Congress has so exercised its constitutional power over waters courts have no power to substitute their own notions of "equitable apportionment" for the apportionment chosen by Congress.

Id.

The resolution of an interstate dispute that had persisted for nearly fifty years was accomplished when this Court deferred to a comprehensive Congressional scheme.

This Court again recognized, albeit somewhat belatedly, the principle of judicial deference when presented with the question of a wrongful death remedy for a high seas fatality in *Mobil Oil Corp.* v. *Higginbotham,* ..... U.S. ....., 98 S.Ct. 2010 (1978). The Court's decision culminated a search for a maritime wrongful death remedy that had begun some ninety years before. In 1886, the Court had ruled that the general maritime law did not provide a survivor's remedy when the victim had died on the high seas. *The Harrisburg,* 119 U.S. 199 (1886). Since the states had enacted wrongful death statutes, that remedy was available when the fatality occurred in state waters, but not beyond the territorial limits. To correct the anomalous effect of a remedy based on how far from the shore the victim had died, Congress passed the Death on the High Seas Act in 1920. 46 U.S.C. §761 *et seq.* The statute granted a wrongful death remedy in admiralty for deaths beyond the three-mile coastal limit. The act is patterned after the state wrongful death statutes, governing the class of beneficiaries, the statute of

limitations, continuation of the action, and contributing negligence. *Id.*

The Supreme Court did not repudiate *The Harrisburg* until 1970, in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970). There the victim had died while working on a vessel in Florida waters. The Florida wrongful death statute did not recognize a claim based upon unseaworthiness. Because the fatality had occurred in state waters, the Death on the High Seas Act was also precluded. In response, the Court specifically overruled *The Harrisburg* and held that the general maritime law provides a wrongful death remedy, thus permitting the widow to seek damages despite Florida law. *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. at 409. That ruling was subsequently broadened in *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1974).

In *Gaudet*, the fatality had occurred aboard a vessel in Louisiana waters. The survivor brought a claim under the general maritime law, seeking compensation for loss of society which was not permitted by the Louisiana wrongful death statute. The Court held that since admiralty had traditionally demonstrated a concern for the survivors of seamen, compensation was available for loss of support, services, and society, without regard to place of death. *Id.* at 590.

The *Moragne* and *Gaudet* decisions, when read together, appeared to replace the Death on the High Seas Act. Where the statute had been enacted to eliminate an inequity between state statutes and the admiralty law, new anomalies had been created when the Court broadened the maritime remedies. The *Gaudet* rule could be used to bypass entirely both the Death on the High Seas Act and state wrongful death statutes.

The confusion created by two parallel remedies, one created by Congress in 1920 and one created by *Gaudet* in 1974 was resolved in *Mobil Oil Corp.* v. *Higginbotham*, ... U.S. ....., 98 S.Ct. 2010 (1978). Again survivors of fatalities in Louisiana waters sought recovery for loss of society based upon general maritime law. The precise issue presented to the Court was whether the *Gaudet* decision or the Death on the High Seas Act provided the measure of damages. This Court deferred to the Death on the High Seas Act, holding that it constituted the Congressional expression of a wrongful death policy. The Court explained:

> [A] desire for uniformity cannot override the statute . . . . The Act does not address every issue of wrongful death law, . . . but when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless . . . . There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted . . . . [*W*]*e have no authority to substitute our views for those expressed by Congress in a duly enacted statute.*

Id. at 2015 (emphasis supplied).

This Court again invoked judicial restraint, reasoning that the goal of uniformity did not justify the nullification of an Act of Congress. As in *Arizona* v. *California*, 373 U.S. 546 (1963), the Court had resolved a decades-long controversy by recognizing that the Court had no authority to displace or modify a Congressional remedy.

Thus, where Congress has addressed an issue, that decision must be respected by the courts, unless the act

is unconstitutional. A judicial remedy may not be invoked to override the Congressional decision. When the Court has adhered to the separation of powers and yielded to the commands of Congress, long-standing interstate controversies have been finally resolved.

B. Congress Has Addressed The Subject Matter Of The "Federal Common Law Of Nuisance" By Enacting Complete And Detailed Statutes Which Prescribe The Appropriate Degree Of Federal Protection Of The Environment.

Since April 24, 1972, the date of this Court's decision in *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972), Congress has enacted, or substantially strengthened, legislation concerning every known environmental medium. While this Court stated "When we deal with *air* or *water* in their ambient or interstate aspects, there is a federal common law . . . ." *id,* at 103 (emphasis added), Congress has gone further.

The modern version of the Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977, was enacted on October 18, 1972 and governs federal control of wetlands and "waters of the United States." 33 U.S.C. §1344, 1362(7). The Clean Air Act of 1970 has been implemented and significantly amended by P.L. 95-95 in 1977. The Resource Conservation and Recovery Act of 1976 ("RCRA," P.L. 94-580) completely revamped the Solid Waste Disposal Act, and created a cradle-to-grave scheme to protect against land, water and air "pollution" from liquid and solid "wastes". 42 U.S.C. §6901(b). The new Toxic Substances Control Act ("TSCA," P.L. 94-469), together with the 1972 revisions to

the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA," P.L. 92-516), regulate the acceptable methods for use of chemicals, including agricultural applications. The Safe Drinking Water Act of 1974 (P.L. 93-523) adds yet another protective measure for public water supplies. And various provisions of other federal statutes control even the siting of new facilities. As a result of these legislative activities, the text of the procedural and substantive regulations promulgated solely by the United States Environmental Protection Agency will soon become more lengthy than those adopted by the Internal Revenue Service.

These statutes, as explained in some detail below, have addressed not only the substance of the federal common law of nuisance, but also the procedural justification for this Court recognizing a federal common law of nuisance claim in *Illinois* v. *Milwaukee*. They contain several features which are relevant to the question presented. Each provides substantial environmental protection in the context of an urbanized and industrial society. The Clean Air, Clean Water and Resource Conservation and Recovery Acts impose mandatory duties upon the Administrator of U.S.EPA to adopt regulations pursuant to economic, scientific and other specified criteria and provides that private citizens may sue in federal court to compel the performance of those dutes. Citizens enjoy broad rights to participate in rulemaking permitting and enforcement actions. The statutes generally provide, however, that when rulemaking and permitting actions are completed, such administrative action must be challenged at that time, and cannot be challenged later. The introduction of new chemicals, significant new uses of chemicals and significant new construction are prohibited by

other statutory provisions until specific standards have been met and administrative approval received. These standards and approvals too are judicially reviewable by an adversely affected person. Thus, Congress has enacted statutes which require regulations defining the appropriate degree of protection, allow for participation by any person affected by administrative action, provide for judicial review of that action and focus judicial enforcement upon final standards. The general Congressional approach to environmental protection has been to involve the executive and the judiciary to carry out its laws, while permitting the states, environmentalists and industry alike to be involved at nearly every stage of the proceedings.

1. Protection of Surface Waters — The Clean Water Act.

Less than six months after the Court's decision in *Illinois* v. *Milwaukee,* Congress enacted, over the President's veto, the modern version of the Federal Water Pollution Control Act, now known as the Clean Water Act. That statute states the definitive federal rule of decision, and should now be expressly so recognized by this Court as displacing the federal common law of nuisance.

The Concept of Discharge Control and Technology-Based Limits

Prior to the 1972 Amendments, the Federal Water Pollution Control Act had provided for actions to restrict those discharges which caused water quality problems. Congress rejected this nuisance-like theory, and opted for control at the point of discharge. *EPA* v. *California,* 426 U.S. 200, 204 (1976). Section 301(b) of

the Act now prescribes the timetable for attainment of specified levels of treatment technology by dischargers. It also establishes the criteria which must be applied to define the appropriate discharge level. 33 U.S.C. §§1311 (b)(1)(A) and (b)(2)(B), 1317(a)(2). The necessary degree of treatment must be based on "the age of equipment and facilities involved, the process employed [and] the engineering aspects of the various types of control techniques, process changes, non-water quality environmental impact (including energy requirements). . . . ." 33 U.S.C. §1314(b)(1)(B), -(2)(B). "Best practicable treatment" must also reflect a "consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved. . . . ," 33 U.S.C. §1314(b)(1)(B) while "best available treatment" must include a consideration of "the cost of achieving such effluent reduction. . . ." *Id.* §1314(b)(2)(B). Publicly-owned treatment works are expected to attain effluent levels similar to best practicable treatment (secondary treatment) and ultimately to employ "best practicable waste treatment technology over the life of the works. . . ." 1281(g)(2)(A). *See id.* §§1311(b)(1)(B), 1311(b)(2)(B). Business which use publicly-owned treatment works are subject to general and categorial pretreatment standards. *Id.* §1317(b)(1).

Permitting Procedure

A second significant feature of the 1972 Amendments was the creation of the National Pollutant Discharge Elimination System ("NPDES") permitting program.

See, EPA v. *California,* 426 U.S. 200, 204 (1976). This program establishes a procedure by which Illinois, or any other state, could contest the permits issued to a source located in another state.

Sections 402(a) and (b) provide that NPDES permits, whether issued by U.S. EPA or a state, are to include conditions which apply and insure compliance with any applicable requirements of sections 301, 302, 306, 307 and 403 of the Act. 33 U.S.C. §1342(a)(1), -(b)(1)(A). The necessary conditions thus include any effluent limitation "necessary to meet water quality standards. . . established pursuant to any State law or regulation. . . ." *Id.* §1311(b)(1)(C). A state with NPDES authority must provide any other state whose waters "may be affected" by a discharge, notice of each application and "an opportunity for public hearing before a ruling on each such application." *Id.* §1342(b)(3). The issuing state must also:

> ". . . insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reason for so doing."

Id. §1342(b)(5); *accord,* Wisc. Stat. §147.11-.13(1),-.20. Congress intended that U.S. EPA would exercise its power to object to the state-proposed permit when another state objects. See 40 C.F.R. §123.24 (1979); 123 Cong. Rec. H 12934 (December 15, 1977). An objection by U.S. EPA would preclude the state from issuing a

valid permit. 33 U.S.C. §1342(d)(2)(A). Congress has now amended the act to authorize U.S. EPA to hold a hearing and itself issue the permit in a dispute between the states. *Id.* §1342(d)(4). Thus, Congress expressly provided a remedy which the Illinois Attorney General could have used and which addressed the very issue originally presented in this court's decision in *Illinois* v. *Milwaukee.* Moreover, section 505(h) allows a Governor of a state to immediately sue the Administrator where U.S. EPA is not enforcing an effluent limitation, which under section 505 includes the requirements of section 301(b)(1)(C) against a discharger located in another state. 33 U.S.C. §§1365(h), -(f)(2).

In addition to the rights granted to adjoining states, the permitting process allows the affected discharger (whether it be an industry or a municipality), the public and other state and federal agencies to participate in the translation of general standards and limitations into specific requirements for the discharger. Unique circumstances may be taken into account under any one of several theories: the plant is fundamentally different than the facilities used as a base for promulgation of regulations (*e.g., Alton Box Board Company* v. *U.S. EPA,* 592 F.2d 395 (7th Cir. 1979); the discharger cannot afford to install additional technology, but is making progress toward eliminating its discharges, 33 U.S.C. §1311(c); the discharger proposes to install innovative technology that has potential long-term benefits over conventional treatment methods, *id.* §1311(k); or the discharge of non-conventional, non-toxic pollutants will not prevent attainment of certain water quality objectives, *id.* §1311(g). In addition, qualifying publicly-owned treatment works and industries who proposed to connect to

such works when completed, may be given until July 1, 1983 to meet the 1977 objectives of section 301(b)(1). 33 U.S.C. §1311(i). Furthermore, municipal treatment plants which discharge to marine waters may receive exemptions or modifications of the general effluent requirements for such discharges if they can meet the water-quality-related, and other criteria specified in section 301(h). 33 U.S.C. §1311(h). And the applicable pretreatment requirements for businesses who discharge to municipal treatment works which provide treatment of a particular regulated pollutant, are to be revised accordingly, so long as the acceptable uses (including disposal) of the municipal sludge are not impaired. *Id.*, §1317(b)(1). The plain intent of this requirement is to eliminate the duplicative costs of "treatment for treatment's sake." 123 Cong. Rec. H 12933 (December 15, 1977). U.S. EPA has promulgated a detailed regulation to implement these pretreatment requirements and revisions, and published its "National Pretreatment Strategy." 40 C.F.R. Part 403 and App. A.

Certainty and Finality of Administrative Action

Another feature of the Act is the certainty and finality accorded administrative action. Section 509(b)(1) provides for review by the circuit court of appeals of regulations issued under sections 301, 302, 306 and 307, the approval of state permit programs under section 402(b) and the denial or issuance of permits by U.S. EPA. *See, Crown Simpson Paper Company* v. *Costle*, 48 U.S. L.W. 3596 (March 18, 1980) (per curiam); *DuPont* v. *Train*, 430 U.S. 112 (1977); 33 U.S.C. §1369(b)(1). Because of the broad right to participate before U.S. EPA, state governments, industry and environmentalists alike

are within the provisions of section 509(b)(1). *E.g., EPA* v. *California,* 426 U.S. 200 (1976); *DuPont* v. *Train,* 430 U.S. 112 (1977); *Natural Resources Defense Council* v. *EPA,* 537 F.2d 642 (2d Cir. 1976). But section 509(b)(2) provides that:

> Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

33 U.S.C. §1369(b)(2). Indeed, the specific requirements for individual permittees pursuant to section 402 and the finality required by section 509(b)(2) were intended to facilitate enforcement of the Act. *See, EPA* v. *California,* 426 U.S. at 205.

In addition, section 402(k) provides that compliance with the terms of an NPDES permit "shall be deemed compliance" for purposes of enforcement actions brought by the Administrator under section 309 and citizens under section 505, with the principal discharge-control sections of the Act. 33 U.S.C. §1342(k). The only exception to this protection is for "any standard imposed under section 307 for a toxic pollutant injurious to human health." *Id.* This section then "insulate[s] permit holders from changes in various regulations during the period of a permit and . . . relieve[s] them of having to litigate in an enforcement action the question whether their permits are sufficiently strict." *DuPont* v. *Train,* 430 U.S. at 138, n. 28. This certainty is destroyed by the federal common law of nuisance as an independent, judicial override of an NPDES permit.

Enforcement by "Citizens"

The legislative decisions made by Congress in the Act are integrally related with the authorization of citizen suits in section 505. By requiring the Administrator to adopt regulations, by providing for the application of the general statutory and regulatory requirements into plant-specific NPDES permits and by stating that final NPDES permits could not later be relitigated, Congress created certainty for the water pollution control effort. Citizen suits against dischargers and the Administrator were allowed by section 505(a). But Congress was emphatic that citizen claims were not to go beyond the requirements established via the administrative processes. And it is clear that both a state and the Illinois Attorney General are "citizens" under section 505. 33 U.S.C. §1365 (g); *Illinois* v. *Outboard Marine Corporation,* Nos. 79-1341, 79-1725 (7th Cir. March 29, 1980).

The legislative history of section 505 begins in the Senate in November, 1971. For purposes of its application to the instant case, the commitee bill is identical to that enacted. The committee report, S.Rep. No. 92-414, 92d Cong., 1st Sess. (1971), states its intent concerning judicial acceptance of "citizen suits."

> Section 505 would not substitute a "common law" or court-developed definition of water quality. An alleged violation of an effluent control limitation or standard would not require reanalysis of technological in [sic] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision. Therefore, an objective evidentiary standard will have to be met by any citizen who brings an action under this section.

Id. at 79, 2 Legis. Hist. at 1497.[1] Congress thus intended that citizens use the federal administrative process to establish necessary effluent limitations before suing in federal court. *See also,* 33 U.S.C. §1365(b)(1)(A) (requiring sixty days advance notice to the Administrator before suit could be filed to compel performance of his duties under the Act).

Furthermore, it is clear that Congress intended section 505 to provide an additional base of federal jurisdiction, but that section 505 was not intended to allow citizens to bypass the detailed and complex administrative scheme created by the Act. Section 505(e) states:

> Nothing *in this section* shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

33 U.S.C. §1365(e) (emphasis supplied). This provision is identical to the 1971 Senate bill. S. 2770, 92d Cong., 1st Sess. §505(e) (1971); 2 Legis. Hist. at 1706; *see also,* Clean Air Act of 1970, §304(e), 42 U.S.C. §7604(e).

The plain meaning of the emphasized language is that section 505 was not intended as the *exclusive* jurisdictional basis for private actions concerning water pollution. But the language clearly implies that the substantive statutory criteria of the Act, including the limitations, standards and other requirements to be prescribed by the Adminis-

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[1] All citations to "Legis. Hist." refer to "A History of the Federal Pollution Control Act Amendments of 1972 (Committee Print, 1973).

trator and the states under the Act, *were to be the federal rule of decision.*

Moreover, the legislative history of section 505(e) makes clear that this subsection was not intended as Congressional acceptance of a substantive federal judicial remedy and common law definition of acceptable water quality. The Senate included section 505(e) in order to preserve claims for damages based on the established law of damages. The 1971 Senate report indicates that traditional class action issues — the identity of the parties, the allegations of a minimal jurisdictional amount and the allocation of the damage award — were deemed inappropriate considerations when citizens are seeking to enforce water pollution controls. S. Rep. No. 92-414, 92nd Cong., 1st Sess. 81 (1971); 2 Legis. Hist. at 1499. The report states:

> Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.

Id. The House report too, published in March, 1972, paraphrases this portion of the Senate Report and states that *section 505* was not intended to pre-empt "other relief under any statute or common law. . . ." H. Rep. No. 92-911, 92d Cong. 2d Sess. 134 (1972); 1 Legis. Hist. at 821. It was not until a month later that the "federal common law of nuisance" for any dispute was adopted by this Court in *Illinois* v. *Milwaukee*. And, we submit, the *ratio decidendi* of that decision was the presence of conflicting state interests and the need for an impartial federal rule of decision, a forum provided by the 1972 Amendments and the present Clean Water Act. Furthermore, in light of a comparable provision in the 1970

Clean Air Act, section 505(e) was clearly not intended to preserve the federal common law of nuisance.

Non-Point Source and Supplemental Controls

In addition to the extensive program to reduce discharges from point sources, the Act contains several programs to control non-point source pollution and remedy eutrophication problems. Section 314 requires the state to prepare and submit an inventory of fresh water lakes according to their eutrophic condition to U.S. EPA and directs U.S. EPA to provide funding sources for methods (including land use planning) to restore the quality of such lakes. 33 U.S.C. §1324(a). Section 108(d) commanded an ambitious, and apparently successful, restoration of Lake Erie and directs the Administrator to fund projects to demonstrate practical methods of removing pollutants from and preventing pollutants from entering the Great Lakes. 33 U.S.C. §1258(a). Basin and regional planning (including multi-state areas) is required to be developed in order to address areas with "substantial water quality control problems." 33 U.S.C. §§1288(a), 1289. And each state must identify priority areas for which the 1977 requirements for technology-based effluent limitations are inadequate "to implement any water quality standard applicable to such waters . . . .", identify the acceptable loadings from NPDES permit holders into that body of water, and to provide for a continuous planning process to meet these needs. *Id.* §1313(d)(1)(A),-(d)(1)(C),-(e)(3).

Municipal Funding

The 1972 Amendments originally passed by Congress were vetoed by President Nixon as too costly, principally because of the sums authorized for construction

of municipal treatment works. 1 Legis. Hist. at 137-139. After the Congress overrode the veto, the President impounded nearly half of these funds, an action which was later held unlawful in *Train* v. *City of New York,* 420 U.S. 35 (1975).

Congress has only authorized the payment to municipalities of a 75 per cent share of the costs recognized as appropriate by the Act. 33 U.S.C. §1282(a). The size and capacity of the proposed treatment facility must "relate directly to the needs to be served by such works, including sufficient reserve capacity. . . ." for future growth. *Id.* §1284(a)(5). Thus primary and secondary treatment of all stormwater flows is not recognized by U.S.EPA as cost-effective and hence eligible for federal funding. EPA, Office of Water Programs Operation, "Program Guidance Memorandum 61," PRM 75-34 (December 16, 1975). Moreover, in response to comments made by the conference committee in the 1979 Appropriations bill, funding of construction for advanced secondary treatment facilities has been restricted by U.S.EPA. EPA, "Grant Funding of Projects Requiring Treatment More Stringent than Secondary", PRM 79-7 (March 9, 1979). Indeed, this policy effects those facilities in Illinois required by the Illinois Pollution Control Board to meet its effluent standards of 10 mg/1 BOD and 12 mg/1 suspended solids. *See Illinois* v. *EPA,* No. 79-3480, (D.D.C., filed ....., 1980).

The effect of a judge-made standard on municipalities and their taxpayers can be onerous. Assume that the funds for a hypothetical municipal treatment works would cost $100 million and that the construction project is eligible for a $75 million federal grant, but that a federal judge determines that additional control, at a cost of $25

million, is appropriate to "abate a nuisance". The capital cost of $25 million must come from local funds, and the municipality must alone pay for additional operating costs. 33 U.S.C. §1284(a)(4). Moreover, the real cost to the municipality, and its taxpayers would double in this hypothetical, even though the federal judge increased the total cost by only 25 per cent.

The presence of the municipal construction program was an important political decision for Congress to make in conjunction with enactment of the 1972 Amendments. Congress has announced the importance of federal aid to assist municipalities in attaining federal environmental requirements. The lower federal courts ought not be authorized, under the banner of nuisance, to create their own standards for discharge control.

2. Protection Of Ambient Air Quality — The Clean Air Act

The other half of the rule announced in *Illinois* v. *Milwaukee* concerns protection of air in its interstate or ambient aspects. Like the Clean Water Act, the Clean Air Act addresses the issue of control of pollution of interstate or ambient air.

Control of Existing Stationary Sources

Section 109 directs the Administrator to adopt "primary" and "secondary" air quality standards for those pollutants for which air quality criteria had been issued. 42 U.S.C. §7409(a). Primary air quality standards are those necessary with an adequate margin of safety to protect public health, while secondary standards are to protect the public welfare from adverse effects associated with the criteria pollutant. *Id.* §7409(b). To attain and

maintain the primary standards, and to achieve ultimately applicable secondary standards, Congress has required the states to submit "implementation plans" to the Administrator for approval. *Id.* §7410(a)(1); P.L. 95-95, §129(c).

After a state implementation plan ("SIP") is submitted, the Administrator proposes his action in the Federal Register. If a public hearing was not held by the submitting state, one must be held by U.S. EPA. 42 U.S.C. §7410(c)(1). Approval of the plan is subject to review in the local circuit court of appeal. *Id.* §7607(b)(1).

The federal question in approving a SIP is quite limited. U.S. EPA may consider only the criteria specified in section 110(a)(2). The most significant question is whether the plan contains adequate enforceable requirements "to insure attainment and maintenance" of the air quality standards within the time period allowed by the Act. *See e.g.,* 42 U.S.C. §§7410(a)(2)(A);-(B);-(I), 7502(a)(1). Each state is free to select whatever mix of environmental controls it finds appropriate. U.S. EPA can only evaluate whether the plan meets the requirements of §110(a)(2). *Natural Resources Defense Council* v. *Train,* 421 U.S. 60 (1974); *Union Electric* v. *EPA,* 427 U.S. (1976).

A necessary ingredient of any state implementation plan is the protection of the interests of adjoining states. Section 110(a)(2)(E) requires that a SIP contain:

> adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementa-

> tion plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 126 relating to interstate pollution abtement;

42 U.S.C. §7410(a)(2)(E). Section 126 requires that each adjoining state receive written notice of the existing and new out-of-state sources which "may have" a significant impact on ambient air quality in that state. *Id.* §7426 (a). The adjoining state may petition the Administrator for a determination of whether or not "any major source emits air pollutants in violation of section 110(a)(2)(E) (i)." *Id.* §7426(b).

If the Administrator finds that plan does not include the prescribed safeguards, he must disapprove the plan and proceed to prepare and promulgate the necessary regulations. *Id.* §7510(a)(1). If a state or private citizen believes the plan as approved by the Administrator to be inadequate to achieve the ambient air quality goals, it may be challenged. *Id.* §7607(b)(1); *Natural Resources Defense Council* v. *Train,* 421 U.S. 60 (1974).

Furthermore, section 126(c) states that any source that does violate section 110(a)(2)(E)(i) is in violation of whatever SIP was approved for the state within which the source is located, regardless of whether any permit has been or would be issued by that state.[2] Hence, any state may sue a source located in another state if that source

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[2] As discussed in the following section, a permit is required before major new or modified facilities are constructed. Moreover, many states, including Illinois, require existing sources to obtain a permit to continue operation, and condition receipt of a permit upon compliance with state regulations. Chapter 2, Rule 103(a) of Illinois Pollution Control Board.

unduly affects its ambient air quality under Section 304 of the Act. The Administrator, however, may permit continued operations conditioned upon timely compliance. 42 U.S.C. §7426(c).

Construction of New or Expanded Facilities

Soon after the Clean Air Act of 1970 was adopted, the Sierra Club sued the Administrator for failing to maintain existing air quality, particularly to protect relatively pristine areas from degradation in air quality due to new construction. The Sierra Club argued that such controls were required as part of every SIP. The court agreed and preliminarily enjoined U.S. EPA from approving SIPs without a regulation protecting against degradation to levels above secondary ambient air quality standards. *Sierra Club* v. *Ruckelshaus,* 1344 F.Supp. 253 (D.D.C. 1972). The Court of Appeals affirmed in a memorandum, unpublished order, and this Court by an equally divided court, affirmed without opinion, *Id., aff'd subnom., Fri* v. *Sierra Club,* 412 U.S. 541 (1973). U.S.EPA subsequently promulgated regulations protecting "clean air" areas against "significant deterioration" and included the regulation in all state plans. 39 Fed. Reg. 42510 (1974). The debate continued, and soon included the extent to which new plants should be allowed to be built in areas where the primary and secondary standards had not been attained. On December 21, 1976, U.S. EPA published its "Interpretative Ruling" as to the circumstances under which major new or expanded facilities could be built under the Act. 41 Fed. Reg. 5524 *et. seq.* Despite these administrative actions, the debates continued and were finally resolved by Congress in the 1977 Amendments to the Act. P.L. 95-95 (1977).

This legislation is significant because it directly contradicts the basic premise of the common law of public nuisance that actions which interfere with a public right will be enjoined. Particularly with regard to non-attainment areas, Congress rejected a prohibition on "new" pollution (construction of new plants or expansions of existing facilities.) Instead, Congress enacted a detailed scheme for progress toward attainment of the standards while permitting even major new emitting facilities to be built.

Subpart D now gives states until December 31, 1982 to attain most primary air quality standards, and in some situations, until December 31, 1987 to attain the standard for photochemical oxidants and carbon monoxide. 42 U.S.C. §7502(a). States must adopt requirements to satisfy Part D as part of their amended implementation plans. *Id.* §7510(a)(2)(I); P.L. 95-95 §129(c). Only the construction of new major emitting facilities (facilities whose construction or expansion causes an increase of more than 100 tons per year of any criteria pollutant) is subject to Part D. 42 U.S.C. §§7410(a)(2)(I), 7503(1)(A), 7602(j). Construction of major emitting facilities is to be authorized where equivalent offsets in emission from other sources will be achieved by the time the new facility begins operation, the allowable emissions from the new or expanded source reflects the "lowest achievable emission rate", other major emitting facilities under common ownership in the state are in compliance, reasonable further progress toward ultimate attainment will not be impeded, and the implementation plan is being carried out. *Id.* §7503.

The 1977 Amendments also addressed the significant deterioration issue, and again provided for adjoining

states to be heard concerning construction of new or expanded facilities. The requirements of Part C are also necessary elements of a state implementation plan. However, the Administrator has already promulgated revised regulations in response to the Amendments, and has proposed substitute regulations to conform to the interpretation of the Act given him by the Circuit Court of Appeals for the District of Columbia in *Alabama Power Co.* v. *Costle,* 606 F.2d 1068 (D.C.Cir. 1979).[3] In that case the court held, *inter alia,* that Part C applied to new major emitting facilities built in non-attainment areas, but only if the attainment area affected was in another state. *Id.* at 1084. The court noted the special attention given by Congress to "interstate" air pollution and the extra coverage of Part C for clean-air areas of another State, citing the provisions of section 110(a)(2)(E)(i) and 126 discussed above. *Id.*

Judicial Review: Certainty, Finality and Citizen Enforcement

The provisions for judicial review under the Clean Air Act are comparable to those discussed above in the Clean Water Act. Further, the case law under the 1970 Act, the 1977 Amendments and the basic complexity of state implementation plans, achieve a result quite similar to the legal effect of the NPDES program.

In *Natural Resources Defense Council* v. *Train,* 421 U.S. 60 (1974), this Court held that a state could issue, and U.S.EPA could approve, variances from an approved implementation plan, but only if those changes were approved as revisions to the SIP. The 1977 Amendments

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[3] The State of Texas and District of Columbia were also parties in this case.

specifically incorporated this requirement in §110(i). 42 U.S.C. §7410(i). Because an implementation plan is reviewable under §307(b)(1), it cannot later be collaterally challenged *Id.* §7607(b)(2); *City of Highland Park* v. *Train,* 519 F.2d 681, 697 (7th Cir. 1975). Thus, approval of an implementation plan provides certainty and finality as to the requirements needed to achieve the Congressional goals.

Second, the effect of the Clean Air Act is to prohibit judge-made definitions of common law air quality standards. The keystones of the act are the ambient air quality standards, mandated for "criteria" pollutants, under section 109(a). 42 U.S.C. §7409(a) Review of these standards is also provided for by section 307(b)(1); hence they too cannot be re-litigated in enforcement actions, either for being too strict or not strict enough. *See DuPont* v. *Train,* 430 U.S. at 138, n. 28. Administrative re-evaluation of these standards is required at five year intervals. 42 U.S.C. §7409(d).

Third, citizen enforcement is authorized against any person who allegedly is in violation of an "emission standard or limitation" or an order of the Administrator or a state concerning the standard or limitation. The words "emission standard or limitation" is a defined phrase for purposes of section 304. It includes several specific types of requirements established under the Act or by an implementation plan, but does not include primary or secondary air quality standards. *Id.* §7604 (f).

Further, section 304(e) is a savings clause. But like the Clean Water Act it simply states that "this section" is an exclusive remedy and uses the same words, "any statute or common law" as found in section 505(e) of

the Clean Water Act. Yet section 304(e) was drafted in 1970 and enacted in December, 1970, long before *Illinois* v. *Milwaukee* was even filed. Thus, it would be extremely presumptuous in interpret the language, in either statute, as a Congressional authorization for a substantive judge-made body of environmental law parallel to these statutes.

Motor Vehicle Emissions

An alleged anti-competitive restraint in the development of motor vehicle emissions equipment was the subject matter of *Washington* v. *General Motors Corp.*, 406 U.S. 109 (1972), decided the same day as *Illinois* v. *Milwaukee*. Congress has now made clear that the timetable for the development and installation of such equipment is a legislative judgment. It has repeatedly adjusted the timetable and requirements of Subchapter II, Part A, of the Clean Air Act. 42 U.S.C. §§7521 to 7551. And it has generally prohibited state regulation of new motor vehicles which are subject to the act. Id. §7543(a), (c).

3. The Resource Conservation and Recovery Acts

Enacted in 1976 as a complete amendment to the Solid Waste Disposal Act (42 U.S.C. §3251 *et. seq.*), the Resource Conservation and Recovery Act ("RCRA", 42 U.S.C. §6901 *et. seq.*) extends federal regulation far beyond interstate air and water pollution control. Congress found that the prevailing practice of refuse disposal in landfills, the greater quantities of solid waste caused by air and water pollution treatment, the decreasing availability of disposal sites and the threat of air and water pollution resulting from inadequate disposal of solid and hazardous waste required immediate

action. *Id.* §6901(b). It directed the Administrator to promulgate the most far-reaching set of federal environmental regulations, prescribing standards for persons who either generate, transport, treat, store or dispose of "hazardous waste." The Act authorized the creation of regional and multi-state agencies to formulate regional plans for waste disposal. *Id.* §§6904, 6941, 6942(a), 6946 (a), (c).

Comprehensive Federal Standards

Under section 3001, the Administrator must identify the characteristics for identifying hazardous waste and list particular hazardous wastes. 42 U.S.C. §6921(a), (b). Any waste listed [*see* 45 Fed. Reg. 33119-33 (1980)], and any person who handles such a waste, are subject to stringent standards. The standards fit together as a (cradle-to-grave) regulation of these materials. Generators must keep records, prepare a proper manifest and properly label and prepare hazardous wastes for shipment. 42 U.S.C. §6922. Transporters are essentially expected to insure that the labeling is proper, the manifest in order, and to keep records and deliver the waste only to the permitted treatment, storage or disposal facility identified in the manifest. *Id.* §6923(a). Persons who treat, store or dispose of hazardous wastes are subject to standards requiring proper recordkeeping, reporting and self-monitoring, requiring satisfactory treatment storage and disposal practices, requiring financial responsibility generally and contingency plans for unanticipated events, and obtaining a permit to operate the site. *Id.* §§6924, 6925.

These regulations are truly awesome in their bulk, complexity and stringency. See 45 Fed. Reg., May 19, 1980, Parts II, III, V, VI, VII. For example, to be permitted

and to remain in operation all hazardous waste disposal sites must deposit a sufficient reserve fund to pay for the proper closing and sealing of the site when its use ceases. 45 Fed. Reg. at 33243-44 (1980). And before any active disposal site is closed, a sufficient fund must be deposited to pay for monitoring, patrolling and otherwise securing the site for thirty years. *Id;* 40 C.F.R. §§265.117(d), 265.144(a).

State Authority and Programs

Because this comprehensive regulatory structure is intended to protect against land, air and water pollution including contamination of any groundwater, the federal program should provide sufficient protection against any interstate disputes. While states may prepare their own plans for the enforcement of the federal standards, these programs must be equivalent to the federal program, and provide adequate enforcement of compliance with the federal requirements, and must not be inconsistent with programs applicable in other states. *Id.* §6926(b), (e). The states are prohibited from imposing "any requirements less stringent than the applicable federal requirements." *Id.* §6929. The states may, in addition, submit plans for the closure of open dumps and the application of proper criteria for sanitary landfills for disposal of all non-hazardous wastes. *Id.* §§6943, 6944, 6945. These plans must meet federal guidelines that "insure the reasonable protection of the ground and surface waters from leachate contamination, the reasonable protection of the quality of the surface waters from surface runoff contamination, and the reasonable protection of ambient air quality." *Id.*

§6942(b)(1).[4] Final agency action approving these programs is reviewable.

Judicial Review and Citizen Participation

Like the Clean Air and Water Acts, RCRA permits citizens to sue the Administrator where he has failed to perform a nondiscretionary duty. 42 U.S.C. §6972(a)(2). RCRA creates more mandatory duties than either the air or water acts: the Administrator has a duty to promulgate the several sets of regulations to implement the hazardous waste programs under subtitle C, and duties under subtitle D to establish various guidelines for supplemental state plans to control non-hazardous wastes and to upgrade open dumps. Several private groups, including the Illinois Attorney General, have used this provision to hasten final administrative action.

The final regulations are made judicially reviewable in the Circuit Court of Appeals for the District of Columbia. But these rules cannot later be challenged in an enforcement proceeding. *Id.* §6976(1). Additionally, "any person may petition the Administrator for the promulgation, amendment or repeal of any regulations under this Act," and special provision is made for a Governor to request the Administrator to identify or list a material as a hazardous waste. *Id.* §§6974(a), 6921(c). Public participation in all phases of the program "shall be provided for, encouraged and assisted by the Administrator and the States." *Id.* §6974(b).

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[4] In addition to the protection provided by RCRA and the Clean Water Act, the Safe Dinking Water Act, 42 U.S.C. §300 *et seq.*, provides protection for potable water, as contrasted with the conditions of ambient water which composes the raw intake source.

Thus, RCRA provides for comprehensive and final federal standards to guide states and interstate agencies in protecting groundwater, surface water and the ambient air against unreasonable contamination. It encourages public participation and guarantees that the federal courts will review administrative action to assure its conformance to the legislative commands. RCRA is another comprehensive scheme for the control of waste materials.

4. Regulation of Chemicals to Avoid Unreasonable Risks to Health and the Environment (FIFRA and TSCA)

Both the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA", 7 U.S.C. §135 *et. seq.*) and the Toxic Substance Control Act ("TSCA", 15 U.S.C. §2601 *et. seq.*) deal with licensing chemical products before use, and restrictions upon their use and disposal. The purpose of both statutes is to avoid unreasonable risks of injury to the environment. In contrast to the preceding statutes which focus on controls of waste products, these acts represent an environmental planning approach.

The present version of FIFRA was enacted October 21, 1972, three days after final passage of the Federal Water Pollution Control Act of 1972. Administration of FIFRA was transferred from the Department of Agriculture to U.S.EPA. The pre-existing regulations, however, continued in affect for four years. Sales of unregistered "economic poison" were declared unlawful, 7 U.S.C. §135 (a), as were sales of any poison not stored in its original container. Judicial review is provided for anyone adversely affected by these regulations. 7 U.S.C. §135b(d).

Registration of all pesticides is required. 7 U.S.C. §135a(a). Extensive disclosure statements regarding the

composition of the substances must comply with specific data requirements. 7 U.S.C. §136a(c)(2). A pesticide becomes registered when it has met the criteria announced in the statute. 7 U.S.C. §136a(c)(5), (6). Provision is made for a system of pesticide classification and definition. 7 U.S.C. §136a(d). The statute places specific controls upon anyone who uses pesticides in a restricted manner. 7 U.S.C. §136b(a). Procedures for administrative review, 7 U.S.C. §136d(a), and judicial review, 7 U.S.C. §136n, assure that citizen and industry viewpoints will be considered in the registration process, and that special or unique circumstances can be addressed.

The Toxic Substances Control Act governs the manufacture, distribution, and use of essentially all chemical substances not already regulated by other federal agencies. 15 U.S.C. §2602(2). The statute requires a premanufacture notice to U.S.EPA and testing by the manufacturer or processor to demonstrate that the proposed use of the chemical will not pose an unreasonable risk of injury to human health or the environment. *Id.* §2604(a), (b). A notice of the receipt of a pre-manufacture application must be placed in the Federal Register. 15 U.S.C. §2604(a), (b). The U.S.EPA is authorized to regulate the manner in which new and existing chemical substances are used. 15 U.S.C. §2605(a). The statute grants citizen rights to enforce both the pre-manufacture notices and the use regulations, and to compel U.S.EPA to take mandatory actions. 15 U.S.C. §2619. In addition, a citizen can petition U.S.EPA to perform its duties or adopt a rule, and can appeal the denial of a petition. 15 U.S.C. §2620(a), (b)(4)(A).

5. Federal Restraints on Major New Developments

Another form of "nuisance-prevention" is found is several federal statutes and their implementing regulations which restrain development of certain environmental areas. We mention here only a few.

As noted above, the Clean Water Act contains requirements for regional planning for growth and the ability of stream segments to handle effluent loadings. 33 U.S.C. §§1288(b), 1313(d). Any dredging or filling activities in protected wetland areas must be permitted before they are begun. *Id.* §1344. The Clean Air Act Amendments of 1977 contain significant new requirements for the conditions under which any major new or expanded industrial facility may be constructed. Varying degrees of development are permitted in clean air areas based upon the allowable increment, which defines the allowable degree of air quality deterioration. These increments in turn depend upon the land use of the affected area. 42 U.S.C. §§7472, 7473(b), 7474, 7476(d) (2) (C) (iv), 7475(d) (2) (D) (iii), 7491(a) (1).

Other statutes contain additional landuse controls or incentives for state control pursuant to Congressional criteria. Complementing the new direct controls on coastal wetland development are the ancient requirements of sections 10 and 13 of the 1899 Rivers and Harbors Act. 33 U.S.C. §§403, 407, 1344. Congress has also given the coastal states a fiscal incentive to develop coastal zone plans by its enactment of the Coastal Zone Management Act of 1972. 16 U.S.C. §1451 *et. seq.* Under the Act, implementation depends upon coastal states submitting land use programs for their coastal zones. The administrative criteria for approval of these state plans provide that

local and regional uses which depend upon a coastal location are to be preferred to non-coastally dependent uses. *See generally,* 15 C.F.R. §923.12(c)(4), (c)(5), (d)(3), (d)(4), (d)(5), 923.22(a), 923.52(f) (Table 1) (1979). Interestingly, Wisconsin has adopted the necessary state legislation to implement such land use controls, while the Illinois General Assembly refused to enact the requisite state planning authority. *E.g.,* 44 Fed. Reg. 52712.

Surely a decision by the entity to whom Congress has chosen to delegate the discretion to implement a statute should be respected. It would be a gross usurpation of power, for example in the coastal zone situation, for a federal court to fashion a nuisance theory based upon the "federal interest" expressed in the Coastal Zone Management Act. Such an approach effectively disregards Congress' decision to authorize, but not to mandate implementation. Indeed, discretionary implementation frequently is a key element in passage of any other statute, and may be especially true of the Coastal Zone Management Act.

Thus, the courts should strictly observe the terms of the statute, and not read into the act a "good" result or create their own substantive body of law, except in the most compelling of circumstances. *See, Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 197 (1976); *cf. Wheedlin* v. *Wheeler,* 373 U.S. 647, 651 (1963) (the instances where federal common law will be recognized are few and restricted.)

Finally, this Court must consider the judicial role as exemplified by the National Environmental Policy Act ("NEPA", 42 U.S.C. §4331 *et. seq.*). The command of NEPA embodies a general policy of protection of natural

resources. Because of the numerous instances of federal regulation and NEPA's applicability to most actions by federal agencies, NEPA is perhaps the most litigated federal statute concerning conservation of the environment. Numerous federal courts have found a federal interest in the environment based upon NEPA, and from that basis derived a substantive federal remedy. But this Court has consistently held that NEPA provides no substantive judicial remedies. Instead, the judicial function requires that courts subject agency decisions affecting the environment to a close review to determine that the agency did seriously consider the environmental impact of its decision. *See Strycker's Bay Neighborhood Council, Inc.* v. *Karlen,* ..... U.S. ....., 100 S.Ct. 497 (1980); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council,* 435 U.S. 519 (1978); *Kleppe* v. *Sierra Club,* 427 U.S. 390 (1976). Hence, the lack of authority for the lower federal courts to create a substantive requirement based on "nuisance" must also be declared.

C. The Court Should Hold That Congress Has Displaced The Federal Common Law Of Nuisance

The separation of powers doctrine is a basic tenet of federal constitutional law. Two recent decisions by this Court apply this doctrine to facts analagous to the present situation. The rule of *Mobil Oil Corp.* v. *Higginbotham,* ..... U.S. ....., 98 S.Ct. 2010 (1978) and *Arizona* v. *California,* 373 U.S. 546 (1963) is that when Congress has enacted a statute which applies to the subject matter of disputes previously governed by substantive standards of liability created by federal courts, the federal common law remedy is displaced and the case must be decided by the statutory formula. This rule is

but an application of *Erie Railroad* v. *Tompkins,* 304 U.S. 64 (1938), to give the same federal judicial respect to Congress as *Erie* and its progeny have commanded be given to the states. Indeed, to sanction at this time a federal common law of nuisance is to resurrect the discredited "brooding omnipresence" of *Swift* v. *Tyson,* 16 Pet. 1 (1842). *Guaranty Trust Co.* v. *York,* 326 U.S. 99, 102 (1945). Because Congress has enacted applicable legislation to protect the environment, including the provisions of the Clean Water Act which directly apply to the present dispute, there is no constitutional basis for a federal common law of nuisance.

This Court acknowledged that a Congressional statute could displace the federal common law of nuisance in the environmental area in Illinois v. Milwaukee when the Court stated:

> It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance.

406 U.S. at 107.

On the basis of the earlier Illinois v. Milwaukee opinion, this Court should now recognize that the federal common law of nuisance has been displaced by Congressional actions and policy-making. The environmental statutes outlined above are complex and provide an integrated federal program to protect the environment. Because Congress has chosen to harness the expertise of the Administrator and U.S. EPA, and other federal and state agencies, to formulate initially the specified degree of environmental protection, the need no longer exists for a federal common law of nuisance.

Since 1972, Congress has assembled a wide-ranging administrative scheme for environmental regulation. Sub-

stantively, these administrative standards include controls upon point and non-point sources of pollutants to waters of the United States, new and existing stationary sources of pollutants to the ambient atmosphere, emissions from new motor vehicles, acceptance of chemicals and uses of chemicals, appropriate methods for the control of waste products from industries and municipalities, and the acceptable locations for construction of new and larger manufacturing facilities. Procedurally, the statutes include specific mechanisms for the resolution of complaints by one state against pollution or discharges from a facility located in another state, for participation by any affected person in the administrative process by which environmental standards are adopted, for direct administrative and citizen enforcement of established standards, for the finality of the principal administrative standards, and for the efficient use of judicial resources, either by immediate judicial review of these administrative standards, or specific judicial enforcement of final standards. The statutory and administrative processes thus provide certainty and facilitate the orderly and efficient planning by municipalities and industry for the installation of appropriate pollution control equipment and activities.

To allow a federal common law of nuisance to remain is to permit a judicial override of Congressional and administrative procedures. In light of the extensive rights for citizen and state participation and enforcement, there is no need for this judicial override. Further, such an assertion of judicial authority destroys the significance and the incentive for participation in the Congressional program, and sanctions the creation of a ruling body of federal judge-made law.

Further, if this Court applies the federal common law of nuisance in place of this vast Congressional program, all environmental disputes, even wholly intrastate, can become federal claims. *Illinois* v. *Outboard Marine Corp.*, Nos. 79-1341, 79-1725 (7th Cir. March 20, 1980), 14 E.R.C. 1281, and cases cited therein at 1286. Every environmental complaint (even neighbor versus neighbor) would then present a federal question, dramatically expanding the role of the lower federal courts, and drastically increasing their already over-crowded dockets.

CONCLUSION

For the foregoing reasons, the Illinois State Chamber of Commerce respectfully submits that the time has come for this Court to hold that the federal common law of nuisance has been displaced by Congressional action.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS and PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF AMICUS CURIAE OF THE METROPOLITAN WASTE CONTROL COMMISSION

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BRIEF AMICUS CURIAE OF THE METROPOLITAN WASTE CONTROL COMMISSION

INTEREST OF AMICUS

Amicus curiae Metropolitan Waste Control Commission urges this Court to reverse the decision below to the extent it holds that a Federal District Court may proper-

ly order municipal governments to *eliminate* combined sewer overflows, without regard to considerations of economic reasonableness and feasibility, when the requirements of the District Court order are far more stringent than Federal statutory requirements for the *control* of combined sewer overflows.

Having found that serious problems of water pollution and sewage disposal could not be solved effectively and economically by individual units of Minneapolis/St. Paul area municipal government, Minn. Stat. §473.502 (1978), the Minnesota Legislature in 1969 established the Metropolitan Sewer Board, later re-named the Metropolitan Waste Control Commission ("MWCC"), to collect, treat, and dispose of sewage in this metropolitan area. The MWCC is charged with responsibility for sewage treatment and disposal in a seven-county area which includes Minnesota's two largest cities. MWCC serves 101 individual municipalities and a population of approximately two million people (half of Minnesota's residents) in this region of about 3,000 square miles.

The MWCC service area includes three major watersheds, the Mississippi, Saint Croix, and Minnesota Rivers. Ultimately, all effluents and combined sewer overflows from MWCC outfalls enter the Mississippi River, which forms the boundary between the States of Minnesota and Wisconsin downstream of St. Paul. In compliance with its statutory mandate, MWCC operates 17 wastewater treatment plants; 320 miles of interceptor sewers; and numerous ancillary facilities and equipment. The largest single facility, the Metropolitan Wastewater Treatment Plant ("Metro Plant"), provides sewage treatment

for approximately 1,500,000 Minnesotans, more than a third of the State's population. The facility, which discharges to the Mississippi River, has a design flow of 250 million gallons per day.

Originally Minneapolis and St. Paul, and suburban South St. Paul, were served by a combined sewer system: one explicitly designed, before the advent of modern wastewater collection and treatment concepts, to serve the dual function of conveying both sewage and stormwater flows. Although much of the Minneapolis system (and parts of the St. Paul and South St. Paul systems) has been converted to separate storm and sanitary sewers since 1933, a substantial fraction of these urban areas is still served by a combined system. As a result, during high-rainfall periods overflows from these combined sewers must still be diverted to the Mississippi River.

As *amicus curiae*, the MWCC here addresses the single issue of greatest potential impact on its immediate and future operations. MWCC is currently nearing completion of a $270 million expansion of the Metro Plant designed to meet the "secondary treatment" requirements of the Federal Water Pollution Control Act Amendments of 1972, as amended ("FWPCA"), 33 U.S.C. § 1251 *et seq.*, and implementing regulations of the United States Environmental Protection Agency ("EPA"), 40 C.F.R. Part 133. In addition, the MWCC has recently completed extensive planning studies pursuant to section 201 of the Act, 33 U.S.C. § 1281, at a cost of more than $3 million, for the construction of facilities to control combined sewer overflows ("CSO"). Implementation of this CSO control plan is expected to commence in 1981.

The decision below, requiring "elimination" of combined sewer overflows on an asserted Federal common law basis, imposes a burden on the metropolitan Milwaukee area far in excess of the obligations imposed by Congress under the FWPCA. The MWCC is greatly concerned by the potential effect of this decision, as it appears that the MWCC's careful and expensive planning already accomplished may result only in illusory compliance with MWCC's legal obligations. Metropolitan Milwaukee and the service area of the MWCC are in similar geographic circumstances, in the sense that their effluent and overflow discharges reach major interstate waters. A large number of other major sewerage agencies across the nation face the same dilemma. The decision below, if not reversed, will have a national economic impact with few parallels in American history.

The issues presented by the case at bar will of course be addressed by the parties; but the relief sought by Respondents is specific to the Lake Michigan area. The MWCC here seeks to demonstrate the much broader effect the decision below, if permitted to stand, will have on other agencies with a legislative charge similar to that of the Petitioner.

The headquarters office of the Metropolitan Waste Control Commission is 350 Metro Square Building, St. Paul, Minnesota 55101. Written consent of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 42, paragraph 2, is hereto appended (Appendix C).

The case at bar presents a legal issue of vital concern directly affecting the MWCC.

QUESTION PRESENTED

Whether a court may order municipal governments to *eliminate* combined sewer overflows on the basis of a supposed principle of Federal common law, without regard to the costs of compliance with the court's order, when the requirements of the order are far more stringent than the uniform requirements of Federal statutes mandating the *control* of combined sewer overflows.

ARGUMENT

I.

The abatement of water pollution associated with combined sewer overflows can be rationally achieved only if municipal governments are guided by uniform national policy established by the United States Environmental Protection Agency, exercising its expertise and authority delegated by Congress.

During the past five years the United States Environmental Protection Agency (EPA), pursuant to Congressional delegation of authority in the FWPCA (P.L. 92-500, as amended by P.L. 95-217), has fostered a nationwide program for the planning and construction of combined sewer overflow (CSO) control facilities. Implementation of this program will require operating authorities of municipal sewer systems to expend vast amounts of public funds. CSO control projects are eligible for Federal grant assistance up to 75 percent of costs for feasibility studies, design, and construction. FWPCA § 202(a)(1), 33 U.S.C. § 1282(a)(1) (Supp. I, 1979).

EPA has articulated its CSO control program to municipal authorities in a continuum of publications establishing a broad, uniform national policy. (Appendix A.) The cornerstone document is Program Requirements Memorandum 75-34 (hereinafter "PRM 75-34"), issued December 16, 1975. (Appendix B.)

In 1975, the MWCC obtained National Pollutant Discharge Elimination System (NPDES) permits, pursuant to the FWPCA, allowing the discharge of CSO to the Mississippi River from St. Paul area combined sewer systems. One condition of these permits required studies of CSO-related problems in the MWCC's service area; the Petitioner's NPDES/WPDES permits contained a similar provision. In January 1976, the MWCC submitted a grant application to EPA for funding of the required CSO control studies pursuant to FWPCA § 201, 33 U.S.C. § 1281 (1976 and Supp. I, 1979).

During September 1976, MWCC issued a request for proposal to several firms of consulting engineers, outlining the facilities planning study which would be required to determine the most feasible methods of controlling CSO pollution. MWCC's request for proposal was based in large part on the EPA policy summary contained in PRM 75-34. Paramount to this study were requirements that the CSO control program be consistent with EPA-established criteria for preservation of water quality, effluent standards, and applicable program directives, including (*inter alia*) establishment and development of the CSO control program in coordination with EPA and the Minnesota pollution Control Agency (MPCA).

The study is now substantially complete, at a cost to the taxpayers of more than $3 million for the facilities plan alone; it contemplates expenditures in the area of $300 million for CSO control, with implementation commencing in 1981. Failure of this Court to reverse the holding below, which required total "elimination" of Milwaukee's overflow discharges, would throw this entire carefully planned project into a cocked hat. Because it is impossible to predict at what point subsequent litigation might be commenced, it is quite conceivable that totally completed CSO *control* projects would be challenged, and total "elimination" of CSO required.

The marginal benefits of a CSO control program purporting to require total overflow elimination would be unfundable, because of excessive marginal costs, under the terms of PRM 75-34 and FWPCA § 217, 33 U.S.C. § 1297 (Supp. I, 1979). Implementation of any such program would require comprehensive revision of the facilities plans, and would result in years of delay and expenditure of hundreds of millions of public dollars, for negligible and indeed hypothetical benefits. It is inconceivable that any such result would reflect the intent of Congress.

The courts below have required that Petitioner totally "eliminate" CSO discharges. Total elimination is an impossibility, statistically and technically, both in theory and in practice. The District Court fallaciously distinguished control from total elimination. To comply with the District Court's order, Petitioner will have to design facilities to capture and treat combined sewer flows associated with the most severe storm for which it has historical data. But would this result in total "elimination" of CSO?

Absolutely not! Designing treatment works capacity for anticipated future events is a strictly statistical exercise. The occurrence of "error," based on statistical variability of natural events, is a mathematical certainty. Thus if facilities are designed to cope with a storm that statistically occurs once every hundred years, a storm of one in two hundred year severity will create conditions with which the facility cannot cope. This principle cannot be brushed aside, because another operative mathematical certainty is that the 200-year storm may possibly occur in two consecutive years.

For example, the MPCA requires that the MWCC's huge Metro Plant facility now under expansion, whose purpose is to provide full treatment only for dry weather sewage flows, be designed to protect Mississippi River water quality at the lowest river flow volume statistically occurring for seven consecutive days once in ten years. In engineering nomenclature, this flow is called the 7Q10; it is the design receiving water flow for all sewage treatment plants in Minnesota, and most plants nationwide. Notwithstanding that the 7Q10 is well established (by application of statistical principles to historical data) as an event with only a once-in-ten-year probability of occurrence, it has recently occurred two years in a row, 1976 and 1977, at St. Paul. Analysis of CSO pollution problems in terms of total "elimination" simply ignores the most rudimentary engineering and statistical principles. The goal of "elimination" is nothing more than an illusion unless one is prepared to design for the flood Noah encountered; and even that design, in terms of mathematical theory, is only one for control as opposed to elimination.

Another anomaly which emanates from the decisions below is that the required treatment works design is for a statistical storm interval substantially longer than the life expectancy of the facilities. 40 C.F.R. Part 35, Appendix A, 6g(1), provides:

> The treatment works useful life for a cost-effectiveness analysis shall be as follows:
> Land—permanent.
> Waste water conveyance structures (includes collection systems, outfall pipes, interceptors, force mains, tunnels, etc.)—50 years.
> Other structures (includes plant building, concrete process tankage, basins, lift station structures, etc.)—30-50 years.
> Process equipment—15-20 years.
> Auxilliary equipment—10-15 years.

This means, of course, that the courts below have required facility design to accommodate a storm that (as a statistical probability) will not occur during the life of the facility. Inescapably, design engineers must deal with CSO control, not with its elimination.

The geographic circumstances of the MWCC and of Milwaukee are far from unique. Most CSO discharges come from major metropolitan areas, and most CSO discharges reach interstate waters. A list of cities with similar geographic circumstances to the MWCC and Milwaukee would include Washington (D.C.), Chicago, Kansas City, Louisville, Detroit, Omaha, St. Louis, Philadelphia, Buffalo, New York City, Portland (Oregon), Rochester (New York), Cincinnati, Cleveland, and Toledo. Suits against the MWCC asserting Mississippi River pollution have been repeatedly threatened; indeed, the State of Wis-

consin has recently served a notice of intent to sue under the FWPCA. It is patently absurd to state, as has Respondent Illinois, that the decision below will not "open the floodgates" of litigation. (Response of the State of Illinois to the Briefs *Amicus Curiae* of the Mid-America Legal Foundation *et al.*, at 12.) Those dischargers who adhere strictly to EPA directives in constructing CSO control projects will be at the mercy of anyone located downstream. If this Court fails to reverse, the case at bar will provide a weapon for those seeking the illusory goal of total CSO "elimination," even of discharges caused by storms statistically occurring only once in a hundred years or longer. Literally billions of dollars of the taxpayers' money will be needed to protect against eventualities that may occur once in a lifetime, if indeed that often.

If the ruling below stands, *amicus* MWCC would be logically justified in suspending all CSO control efforts until sued. After the courts have resolved the issue, *and only then*, could MWCC proceed with any certainty to spend whatever is required to solve the problem. But even then, as circumstances change, yet another judge presiding over another suit against the MWCC (or any other sewage treatment authority) might provide another remedy for another plaintiff. A judge applying the Federal common law, as the District Court perceived it in this case, may order construction of separation, storage, and treatment systems to protect against a once in ten year storm. Of course, this may require a design employing entirely different and far more extensive (and expensive) facilities than those now planned. That completed, another judge in a subsequent case, perhaps in a different district and circuit, might order total "elimination" of CSO,

as did the District Court in the case at bar. Now, still another design and new engineering concepts will be needed. And if the courts below are correct, absolutely no consideration need be given to the hundreds of millions, even billions, of dollars that slip away in the process. This Draconian scenario may seem strained at first reading; but it is indeed possible, in fact probable, should the decision below remain law. It is essential that the Court resolve this apparent conflict between Federal common law and Federal statutes and regulations, so that those intimately affected may confidently proceed to solve the problems of CSO pollution.

The Court of Appeals would have reached a far more practical and equitable result had it applied the same analysis to CSO control as it did to effluent limitations. Just as the circuit court applied explicit statutory provisions regarding secondary treatment of plant effluents, it would then have applied relevant EPA directives and FWPCA § 217, 33 U.S.C. § 1297 (Supp. I, 1979), to the facts about Milwaukee's CSO problem. The court below chose rather to apply a "black or white" analysis. FWPCA §217 explicitly requires *cost effective* control, with marginal benefits that demonstrably justify the marginal costs. The issue is not, as the court below characterized it, whether raw sewage resulting from CSO should be discharged to public waters. The issue is the *extent* to which municipal dischargers should be required to *control* CSO pollution. EPA policy does not, by any reading, support unrestricted CSO discharges as an acceptable long-range solution.

The Court of Appeals, in support of its reversal of the District Court's effluent limitations, cites a report to Con-

gress by the Comptroller General for the proposition that "several cities began construction of advanced waste treatment facilities without adequate consideration of the expected costs and benefits of such facilities." *Illinois v. Milwaukee*, 599 F.2d 151, 175 (7th Cir. 1979). These same types of questions, in the context of CSO control, are raised in another and more recent General Accounting Office publication, *Report by the Comptroller General of the United States: Combined Sewer Flooding and Pollution—A National Problem; The Search for Solutions in Chicago*, CED 79-77 (May 15, 1979). This report, an in-depth analysis of Chicago's multi-*billion* dollar program to control (*not eliminate*) CSO, raises the principal question whether the level of control targeted is actually worth its projected costs—and whether in any event the nation can afford to pay those costs.

None will question the conclusion of the courts below that unrestricted discharges of raw sewage pose "significant risk." But because total elimination of CSO is a mathematical impossibility, some degree of risk is inevitable. It does not follow, from the fact that the risk of unrestricted discharges is "significant," that only control levels closely approaching total elimination will reduce this risk to acceptable levels.

II.

Federally mandated and funded projects for the control of combined sewer overflows are required by Federal law to be cost effective. The court below erred in disregarding considerations of economic reasonableness and feasibility and requiring the total elimination of Petitioner's combined sewer overflows.

To ignore costs, on these facts, is to bury one's head in the sand. EPA recognized in 1978 that if sewer separations were carried out for all combined systems, the cost would exceed $100 billion. R. Wycoff, J. Scholl, and S. Kissoon, *1978 Needs Survey: Cost Methodology of Control of Combined Sewer Overflows and Stormwater Discharge*, U.S. EPA Report EPA-430/9-79-003 (February 1979).

The United States has only finite resources to allocate to the CSO control problem. In its report to Congress of October 1, 1978, EPA states (at 8-11):

> It must be remembered that any increase in spending for combined sewer overflow control needs . . . will result in a decrease in spending for all other pollution control needs. . . . These tradeoffs must be weighed carefully for any given municipality. It is believed that this site-specific examination of pollution control tradeoffs can best be accomplished in a timely fashion under the present law.

In PRM 75-34 (Appendix B hereto), EPA summarizes its policy to assure that "projects are funded only when careful planning has demonstrated that they are cost effective." A key provision of PRM 75-34, in the context

of the total CSO "elimination" requirement imposed by the courts below, is found in paragraph I.D.4.: one of the "criteria for project approval" is that the "marginal costs are not substantial compared to marginal benefits." PRM 75-34 further requires: "Dollar costs should be compared with quantified pollution reduction and water quality improvements."

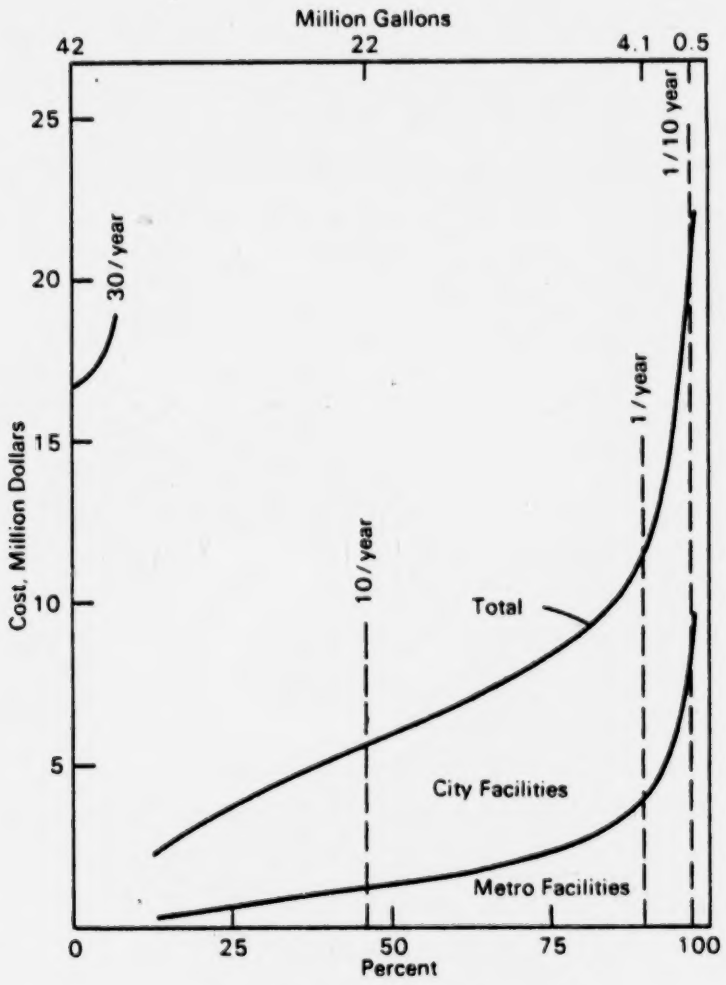
Last year EPA published *Benefit Analysis for Combined Sewer Overflow Control*, EPA-625/4-79-013 (April 1979). The introduction states in part:

> This publication is intended for the use of elected officials of municipalities served by combined sewers, their technical staff members, and their consultants. * * * [T]he subject of benefit analysis is uniquely important to anyone contemplating combined sewer overflow controls because of the nature of the overflows themselves, the distribution of combined sewer systems in the nation, the regulations governing the use of [EPA] construction grant moneys for this purpose, and the potentially high cost of corrective measures.

EPA's cost/benefit analysis policy is graphically illustrated in a case study of the City of Seattle, in the same publication at page 44:

> For each of the overflow areas, a plot of cost versus control level was made utilizing data developed in the control level optimization. . . . In all cases, a pronounced "knee," (indicating a dramatic increase in control costs) was indicated in the one-per-year to one-per-ten year overflow limit range. This knee of the curve is significant because it represents a point where marginal costs begin to increase quite rapidly. In other words, the cost for each additional unit

of pollution control above the knee is much greater than the cost for a comparable increment below it. EPA examines this relationship critically in deciding whether marginal costs are substantial in comparison to marginal benefits.



Cost-Overflow Control Curve

This curve, with its abrupt "knee," is typical of the marginal cost/marginal benefit relationships encountered in CSO control analysis across the nation. It is reasonable to infer that the curve for Milwaukee would be substantially similar; the curve for Minneapolis/St. Paul has been demonstrated in fact to *be* substantially similar. The MWCC's facility plan addressed the problem of selecting as a control level the annual overflow volume reduction that will intersect the "bend in the knee." Put simply, reductions of annual overflow volume beyond this point require in almost all cases an unjustifiable allocation of resources by comparison to the benefit received. As the Seattle graph demonstrates, increasing control from one overflow per year to one overflow per ten years approximately doubles the cost, but increases annual volumetric reduction of overflow only from approximately 90% to 97%. The precipitous, near-vertical rise at the end of the curve indicates that an approach to "elimination" of CSO could be achieved only at costs far exceeding the benefits derived.

As the District Court found, virtually all CSO discharges contain pathogenic organisms. This is a national problem, which requires for its solution a fair allocation of the nation's resources. The Chicago CSO study, as well as the entire body of EPA literature on the subject, recognizes that the funding burden required for near-total CSO elimination would cause an economic impact probably beyond the nation's ability to sustain. In any event, attempts at total elimination of CSO would not be a fair allocation of the nation's resources, considering the small benefits obtained by comparison to the costs. EPA's *Benefit Analy-*

sis for Combined Sewer Overflow Control further counsels, at pages 11-12:

> Selecting the storm conditions (frequency and intensity of storms in a year) around which a control system or facility will be developed is intimately involved in the whole process of determining water use objectives to be achieved through combined sewer overflow controls. The size of control facilities and therefore capital and operating costs can be directly related to the design condition. Financial and technological feasibility, achievable levels of benefits, and public acceptability of the local financial portion of the costs all depend on the design condition selected.
>
> Therefore, early in the benefit selection process, the idea of acceptable risk should be introduced since it will be important when design conditions are set and if any adjustment of the package of desired benefits is made necessary by unacceptably high estimates of costs. Here the aim is to determine the level or range of levels of acceptable beneficial use. Though ideal goals often cannot be reached because of limited funds, it is not always essential that they be achieved anyway [*sic*].

Because risk cannot be completely eliminated even in theory, "acceptable risk" (the level of which must be selected by facilities planners) is a concept mandated by economic and social conditions. Employing climatological data in the MWCC's service area, facility planners for the *amicus* are designing for a storm likely to occur once in a six-month interval. This is consistent with the design criteria suggested by *National Evaluation of Combined Sewer Overflows and Urban Stormwater Discharges*, EPA-600/2-77-064, 600/2-77-064a (1977). To require

Petitioner totally to "eliminate" CSO actually requires facility design for a storm which may not occur more than once every hundred years or so. MWCC facility planners have informally estimated that this level of design would increase costs threefold, raising MWCC service area CSO control costs into the billion-dollar range—and would result in an additional annual volumetric CSO reduction of only five percent.

It simply is not sufficient to dismiss the FWPCA, as did the Court of Appeals, as nothing more than "an appropriate starting point." 599 F.2d 151, 165. The MWCC and thousands of other units of local government have relied on EPA cost effectiveness guidelines, and their underlying concepts, as the *sine qua non* of CSO control facilities planning. Facility plans being prepared, or (as in MWCC's case) already completed, call for the expenditure of billions of dollars on the basis of this reliance. FWPCA § 302(a), 33 U.S.C. § 1312(a) (1976), directly addresses the permissibility of effluent limitations more stringent than basic national requirements, where such limits are necessary to meet applicable standards of receiving water quality—a problem analogous to CSO control. Where imposition of such effluent limits is proposed, FWPCA § 302(b)(1), 33 U.S.C. § 1312(b)(1) (1976), requires "a public hearing to determine the relationship of the economic and social costs of achieving any such limitation . . . including any economic or social dislocation in the affected community . . . to the social and economic benefits to be obtained."

As section 302(b)(1) indicates, and as EPA has stated, pollution control is a system of trade-offs. Congress requires a reasonable relationship between socioeconomic

costs and benefits; this Court must likewise recognize the necessity for cost/benefit analysis in the construction of such vast facilities as those for CSO control. Properly to analyze cost/benefit relationships in the case at bar, the Court would of course need to know the costs themselves. The District Court held that cost was not a factor, effectively depriving both this Court and the Court of Appeals of essential information.

If any doubt remained as to Congressional intent (as interpreted by EPA in PRM 75-34), it was eliminated by the 1977 amendments to FWPCA, P.L. 95-217. FWPCA § 217, 33 U.S.C. § 1297 (Supp. I, 1979), now provides:

> Any guidelines for cost-effectiveness analysis published by the Administrator [of the EPA] under this title shall provide for the identification and selection of cost effective alternatives to comply with the objective and goals of this Act and sections 201(b), 201(d), 201(g)(2)(A), and 301(b)(2)(B) of this Act.

FWPCA § 201(g)(2)(A), 33 U.S.C. § 1281(g)(2)(A), applies *inter alia* to CSO control facilities. Congressional intent is crystal clear: cost effectiveness analysis is paramount. Such considerations appear, however, to have escaped the attention of the courts below.

This Court should, in any event, reverse even if it were unfettered by statute. Forcing the Petitioner (and future public defendants) to spend hundreds of millions of dollars of public funds, for hypothetical benefits not demonstrated to exist in practice, is contrary to equitable principles. Such a result can only lead those burdened by it to despair of ever hitting the target created by the nation's need to maintain an unpolluted environment.

CONCLUSION

Amicus MWCC stands at the threshold of implementing another gigantic community pollution control effort. It has been castigated as recalcitrant, and seeks to get on with solving CSO control problems in its service area. The great body of statutes, regulations, rules, directives, proclamations, and ordinances of Federal, State, and local governments create a complicated, but at least predictable, framework within which MWCC must operate. Environmental goals are elusive, but achievable—*if* the MWCC and the Petitioner can rely upon some degree of uniformity in the legal obligations to which they must respond. Because Congress sponsors the performance of those legal obligations through the grant funding process, Congress has provided a uniform (if complex) framework of statutes and regulations designed to assure that legislative intent is translated into practical results. Such uniformity becomes an illusion if the Federal courts are at liberty to ignore this statutory plan.

Respectfully submitted,

HILLSTROM & MARTINSON, LTD.
By Robert A. Hillstrom
1330 Soo Line Building
Minneapolis, MN 55402
(612) 332 - 8063
Attorneys for Metropolitan Waste Control Commission

APPENDIX A

Environmental Protection Agency Publications
Relating to CSO Control

1. H. H. Benjes, Jr., *Cost Estimating Manual—Combined Sewer Overflow Storage and Treatment,* U.S. EPA Report, EPA 600/2-76-286 (NTIS: PB-266-359) (Dec. 1976).

2. Environmental Research Information Center, *Benefit Analysis for Combined Sewer Overflow Control,* EPA 625/4-79-013 (Apr. 1979).

3. J. P. Heaney, "A Strategy for Integrating Storage Treatment Options with Management Practices," presented at EPA Technology Transfer Seminars on Combined Sewer Overflow Assessment and Control Procedures, 1978.

4. J. P. Heaney, W. C. Huber, and S. J. Nix, *Stormwater Management Model: Level I—Preliminary Screening Procedures,* U.S. EPA Report, EPA 600/2-76-275 (NTIS: PB-259-916) (Oct. 1976).

5. J. P. Heaney and S. J. Nix, *Stormwater Management Model: Level I—Comparative Evaluation of Storage Treatment and Best Management Practices,* U.S. EPA Report, EPA 600/2-77-083 (Apr. 1977).

6. J. A. Lager, "CSO Treatment Potential and Information Source for Small to Medium Sized Communities", presented at EPA Technology Transfer Seminars on Combined Sewer Overflow Assessment and Control Procedures, 1978.

7. J. A. Lager, W. G. Smith, W. G. Lynard, R. M. Finn and E. J. Finnemore, *Urban Stormwater Management and Technology: Update and User's Guide,*

U.S. EPA Report, EPA 600/8-77-014 (NTIS: PB-275-654) (Sept. 1977).

8. Municipal Environmental Research Laboratory, Office of Research and Development, U.S. EPA, *Areawide Assessment Procedures Manual*, Vol. I, II, and III. U.S. EPA Report, EPA 600/9-76-014 (Jul. 1976).

9. J. T. Rhett, "Program Requirements Memorandum, No. PRM 75-34", Water Programs Operations, U.S. Environmental Protection Agency (Dec. 16, 1975).

10. J. T. Rhett, "Program Requirements Memorandum, No. PRM 77-4", Water Programs Operations, U.S. Environmental Protection Agency (Dec. 16, 1976).

11. B. Turner, R. Holbrook, R. Corbitt, and R. Wycoff, *1976 Needs Survey: Summary of Technical Data for Combined Sewer Overflow and Stormwater Discharge*, U.S. EPA Report, EPA 430/9-76-012 (Feb. 1977).

12. U.S. Environmental Protection Agency, "Report to Congress on Control of Combined Sewer Overflows in the United States (MCD-50)" (1978).

13. R. Wycoff and M. Mara, *1978 Needs Survey: Continuous Stormwater Pollution Simulation System User's Manual*, U.S. EPA Report, EPA 430/9-79-004 (Feb. 1979).

14. R. Wycoff, J. Scholl, and S. Kissoon, *1978 Need Survey: Cost Methodology for Control of Combined Sewer Overflow and Stormwater Discharge*, U.S. EPA Report, EPA 430/9-79-003 (Feb. 1979).

APPENDIX B

United States Environmental Protection Agency
WASHINGTON, D.C. 20460

Dec. 16, 1975

Program Requirements Memorandum PRM No. 75-34
Program Guidance Memorandum PG-61

SUBJECT: Grants for Treatment and Control of Combined Sewer Overflows and Stormwater Discharges

FROM: John T. Rhett, Deputy Assistant Administrator for Water Program Operations (WN-546)

TO: Regional Administrators
Regions I - X

This memorandum summarizes the Agency's policy on the use of construction grants for treatment and control of combined sewer overflows and stormwater discharges during wet-weather conditions. The purpose is to assure that projects are funded only when careful planning has demonstrated they are cost-effective.

I. *Combined Sewer Overflows*

A. *Background*

The costs and benefits of control of various portions of pollution due to combined sewer overflows and by-passes vary greatly with the characteristics of the sewer and treatment system, the duration, intensity, frequency and areal extent of precipitation, the type and extent of development in the service area, and the characteristics, uses and water quality standards of the receiving waters. Decisions on grants for control of combined sewer overflows, therefore, must be made on a case-by-case basis after detailed planning at the local level.

Where detailed planning has been completed, treatment

or control of pollution from wet-weather overflows and by-passes may be given priority for construction grant funds only after provision has been made for secondary treatment of dry-weather flows in the area. The detailed planning requirements and criteria for project approval follow.

B. *Planning Requirements*

Construction grants may be approved for control of pollution from combined sewer overflows only if planning for the project has thoroughly analyzed for the 20 year planning period:

1. Alternative control techniques which might be utilized to attain various levels of pollution control (related to alternative beneficial uses, if appropriate), including at least initial consideration of all the alternatives described in the section on combined sewer and stormwater control in "Alternative Waste Management Techniques and Best Practicable Waste Treatment" (Section C of Chapter III of the information proposed for comment in March 1974).

2. The costs of achieving the various levels of pollution control by each of the techniques appearing to be the most feasible and cost-effective after the preliminary analysis

3. The benefits to the receiving waters of a range of levels of pollution control during wet-weather conditions. This analysis will normally be conducted as part of State water quality management planning, 208 areawide management planning, or other State, regional or local planning effort.

4. The costs and benefits of addition of advanced waste treatment processes to dry-weather flows in the area.

C. *Criteria for Project Approval*

The final alternative selected shall meet the following criteria:

1. The analysis required above had demonstrated that the level of pollution control provided will be necessary to protect a beneficial use of the receiving water even after technology based standards required by Section 301 of P.L. 92-500 are achieved by industrial point sources and at least secondary treatment is achieved for dry-weather municipal flows in the area.

2. Provision has already been made for funding of secondary treatment of dry-weather flows in the area.

3. The pollution control technique proposed for combined sewer overflow is a more cost-effective means of protecting the beneficial use of the receiving waters than other combined sewer pollution control techniques and the addition of treatment higher than secondary treatment for dry-weather municipal flows in the area.

4. The marginal costs are not substantial compared to marginal benefits

Marginal costs and benefits for each alternative may be displayed graphically to assist with determining a project's acceptability under this criterion. Dollar costs should be compared with quantified pollution reduction and water quality improvements. A descriptive narrative should also be included analyzing monetary, social and environmental costs compared to benefits, particularly the significance of the beneficial uses to be protected by the project.

II. *Stormwater Discharges*

Approaches for reducing pollution from separate storm-

water discharges are now in the early stages of development and evaluation. We anticipate, however, that in many cases the benefits obtained by construction of treatment works for this purpose will be small compared with the costs, and other techniques of control and prevention will be more cost-effective. The policy of the Agency is, therefore, that construction grants shall not be used for construction of treatment works to control pollution from separate discharges of stormwater except under unusual conditions where the project clearly has been demonstrated to meet the planning requirements and criteria described above for combined sewer overflows.

III. *Multi-purpose Projects*

Projects with multiple purposes, such as flood control and recreation in addition to pollution control, may be eligible for an amount not to exceed the cost of the most cost-effective single purpose pollution abatement system. Normally the Separable Costs-Remaining Benefits (SCRB) method should be used to allocate costs between pollution control and other purposes, although in unusual cases another method may be appropriate. For such cost allocation, the cost of the least cost pollution abatement alternative may be used as a substitute measure of the benefits for that purpose. The method is described in "Proposed Practices for Economic Analysis of River Basin Projects," GPO, Washington, D. C., 1958, and "Efficiency in Government through Systems Analysis," by Roland N. McKean, John Wiley & Sons, Inc., 1958.

Enlargement of or otherwise adding to combined sewer conveyance systems is one means of reducing or eliminating flooding caused by wet-weather conditions. These additions may be designed so as to produce some benefits

in terms of reduced discharge of pollutants to surrounding waterways. The pollution control benefits of such flood control measures, however, are likely to be small compared with the costs, and the measures therefore would normally be ineligible for funding under the construction grants program.

All multi-purpose projects where less than 100% of the costs are eligible for construction grants under this policy shall contain a special grant condition precluding EPA funding of non-pollution control elements. This condition should, as a minimum, contain a provision similar to the following:

> "The grantee explicitly acknowledges and agrees that costs are allowable only to the extent they are incurred for the water pollution control elements of this project."

Additional special conditions should be included as appropriate to assure that the grantee clearly understands which elements of the project are eligible for construction grants under Public Law 92-500.

APPENDIX C

(Telegram) May 28, 1980

Mr. Robert A. Hillstrom, Attorney
c/o Metropolitan Waste Control Commission
1330 Soo Line Building
Minneapolis, MN 55402

Re: City of Milwaukee *et al.* v. State of Illinois *et al.*, U.S. Supreme Court Docket #79-408

Dear Mr. Hillstrom:

Pursuant to Supreme Court Rule 42, paragraph 2, the State of Illinois hereby consents in writing to the filing of a brief *amicus curiae* on behalf of the Metropolitan Waste Control Commission in the above-captioned case.

Sincerely,

Joseph V. Karaganis, Attorney for the People of the State of Illinois

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(Telegram) May 28, 1980

Robert A. Hillstrom
Attorney for Metropolitan Waste Control Commission
1330 Soo Line Building
Minneapolis, MN 55402

Re: City of Milwaukee *et al.* v. State of Illinois *et al.*, United States Supreme Court Docket Number 79-408

Dear Mr. Hillstrom:

Pursuant to Supreme Court Rule 42, paragraph 2, the State of Michigan hereby consents in writing to the filing

of a brief *amicus curiae* on behalf of the Metropolitan Waste Control Commission in the above-captioned case.

Sincerely,

Thomas L. Casey
Assistant to Attorney General

QUARLES & BRADY
780 North Water Street
Milwaukee, Wisconsin 53202

May 28, 1980

Robert A. Hillstrom, Esq.
Hillstrom & Martinson, Ltd.
1330 Soo Line Bldg.
Minneapolis, MN 55402

Re: City of Milwaukee *et al.* v. State of Illinois *et al.*,
United States Supreme Court Case No. 79-408

Dear Mr. Hillstrom:

We hereby consent on behalf of the Metropolitan Sewerage Commission of the County of Milwaukee and the Sewerage Commission of the City of Milwaukee to the filing of a brief by the Metropolitan Waste Control Commission as *amicus curiae* in the above-captioned matter. We are also authorized and hereby consent to such filing by the City of Milwaukee.

Very truly yours,

QUARLES & BRADY
/s/ Richard W. Cutler

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-408

CITY OF MILWAUKEE, ET AL.,

Petitioners,

v.

STATE OF ILLINOIS, ET AL.,

Respondents.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF MID-AMERICA LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF MID-AMERICA LEGAL FOUNDATION AS AMICUS CURIAE

JOHN M. CANNON
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Chicago, Illinois 60606

IN THE

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OCTOBER TERM, 1979

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OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF MID-AMERICA LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to this Court's Rule 42, Mid-America Legal Foundation ("*Mid-America*") hereby moves the Court for leave to file the attached brief as *amicus curiae* in support of the

position of petitioners on the need to accommodate the federal common law of nuisance with the federal statutory and regulatory program for clean water.

Mid-America has an interest in the disposition of the case which is before this Court on a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Seventh Circuit in *Illinois* v. *City of Milwaukee,* 599 F.2d 151 (7th Cir. 1979) based upon the expertise and purpose of this organization.

Mid-America was organized in 1975 as an Illinois not-for-profit corporation to engage in non-partisan legal research, study and analysis for the benefit of the general public as to the effect of evolving concepts of law on our democratic institutions and to provide legal representation on matters of public interest at all levels of the judicial process. *Mid-America* takes special interest in questions of law of a national scope that originate in or have a direct effect on the mid-America region, namely, Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin. It has an interest in this case because the decision below interprets the Federal Water Pollution Control Act of 1972, PL 92-500, the Clean Water Act of 1977, PL 95-217 which amends the 1972 Act, and the federal common law of nuisance in a way which affects the interests of every state which shares a waterway with one or more states. By analogy, the implications of this decision extend beyond the question of interstate water pollution to include problems of air pollution, land use, safety and energy production.

Mid-America respectfully submits that its brief, lodged herewith, presents at least one analysis of a significant question of federal law and related authority which is not presented by the parties. It, therefore, believes that the question would not otherwise be presented, or at least adequately presented with related authority, although it could be dispositive of the issues in this case.

It is the view of *Mid-America* that the Court of Appeals improperly applied the federal common law of nuisance in the context of a comprehensive federal statutory program for water pollution control and that the decision below is in conflict with applicable decisions of this Court under the federal common law of public nuisance.

Mid-America has received the written consents of the State of Illinois and the City of Milwaukee, et al. Copies of these letters have been filed with the Clerk. Consent was refused by counsel for the State of Michigan, thereby necessitating this motion.

Mid-America respectfully urges the Court to grant this motion for leave to file the attached brief as *amicus curiae.*

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-408

CITY OF MILWAUKEE, ET AL.,

Petitioners,

v.

STATE OF ILLINOIS, ET AL.,

Respondents.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF MID-AMERICA LEGAL FOUNDATION AS AMICUS CURIAE

INTEREST OF AMICUS

The interest of Mid-America Legal Foundation *("Mid-America")* as *amicus curiae* is stated briefly in the motion for leave to file this brief. It is appropriate to expand on that statement here.

Mid-America has an interest in this case because the decision below interprets the Federal Water Pollution Control Act of 1972, PL 92-500 ("FWPCA"), the Clean Water Act of 1977, PL 95-217, which amends the 1972 Act, and the federal common law of public nuisance in a way which affects the interests of every state which shares a waterway with one or more other states.

The ramifications of this decision, however, extend beyond the scope of an individual state's interest in water pollution to include potential problems of interstate land use, air pollution, safety and energy production premised on the federal common law of public nuisance, a heretofore limited and amorphous body of law.

The present case, involving allegations of interstate water pollution, is not singular and should not be considered in isolation. The geography of the nation itself would turn the variable standard applied by the district court and the court of appeals into a quagmire of judicial uncertainty. Every state which discharges sewage into a common waterway in compliance with federal legislative standards, nonetheless, may be subject to imposition of more stringent standards under federal common law, even though the complaining state itself does not comply with the asserted common-law standard. By analogy this same discrepancy in standard also would arise in cases involving air pollution, land use, safety and energy production.

The economic impact of the lower court's decision is equally significant. The courts below expanded the role of the judiciary in this area by effectively substituting their judgment for that of Congress, the states and local entities in determining both the priority of expenditures and the methods of abating a type of water pollution.

It is indeed paradoxical that even though during the course of the present litigation Congress detailed with considerable specificity the federal standards for water pollution control and

tightened enforcement procedures under these standards, the court below chose to ignore these developments and instead expand the body of federal common law in a manner that can only result in confusion and proliferation of litigation.

It is on the basis of an appreciation of these circumstances and the direct application of the precedent established with respect to the relationship of federal common law and statutory law in many other areas of current significant legislation that the *amicus* has developed an interest in the matter before the Court.

QUESTION PRESENTED

Although phrased in a variety of detail by petitioners, the central question may be framed in the terms and circumstances of the case as follows:

> *Where the occasional discharge of pathogens into local waters complies with the applicable federal and state statutes and regulations, does a neighboring State establish a claim of public nuisance under federal common law merely by showing that pathogens so discharged may sometimes reach its own waters and possibly infect its residents?*

ARGUMENT

1. The Court of Appeals Improperly Applied the Federal Common Law of Nuisance in the Context of a Comprehensive Federal Statutory and Regulatory Program for Water Pollution Control.

The capability of federal common law to resolve interstate environmental disputes is limited by an inability to contribute to the comprehensive planning essential for environmental control. As prophetically indicated in the Note, *Federal Common Law & Interstate Pollution,* 85 Harv. L. Rev. 1439 (1972), which pre-dated this Court's decision in *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972):

> The inadequacy of case-by-case adjudication as a mode of considering all interests in setting environmental standards may be traced to two sources. First, the interests are too diverse and numerous to be represented in court *at the same time.* . . . Second, proper consideration of all environmental interests is beyond the courts' technical competence. . . . In view of these two limitations, courts will merely apply the analytical touchstones of the common law, such as reasonableness and fault on a case-by-case basis, without formulating them with the specificity and complexity requisite for comprehensive lawmaking in the environmental area. . . . 1453.

This is not to disclaim any role for federal common law when properly accommodated to the comprehensive federal statutory program to control water pollution under the FWPCA as amended. On the contrary, the two regimes can and obviously should complement one another. It is when the common law clashes with the statutory and regulatory program, however, that the need for an evaluation of the relationship between the two becomes imperative. The specter of costly and potentially stultifying confusion is raised by interference with the comprehensive legislative plan for water pollution control.

The interplay between federal common law and federal legislation surfaced early in the course of this litigation when this Court denied original jurisdiction. *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972). Noting that an action might be filed in a district court based on "federal common law," this Court indicated that the limited federal legislation then extant had not supplanted the common law. 406 U.S. at 102. The decisions cited by this Court to illustrate the federal common law also did so in the absence of comprehensive federal legislation on the same matter.

For example, in *Hinderlider* v. *La Plata Co.,* 304 U.S. 92 (1937), two states disputed their rights in the water of an interstate stream. This Court decided the issue under federal common law because the interest of federalism precluded control by the law of either state. The decision, which occurred more than 10 years before enactment of the original Federal Water Pollution Control Act of 1948, never addressed the impact which a comprehensive federal statute on the same subject might have on related federal common law.

Similarly, *Texas* v. *Pankey,* 441 F.2d 236 (5th Cir. 1971) cited by this Court as stating the "controlling principle" of federal common law, limited application of the common law standard "until the field has been made the subject of comprehensive legislation or authorized administrative standards." *Id.* at 241-242. In *Illinois* v. *Milwaukee, supra,* this Court, quoting *Pankey,* carefully observed that there was no applicable federal statute as there is in the case now before the Court. 406 U.S. at 99-101.

While federal common law may not be completely preempted or eliminated by a comprehensive federal statute on the same subject, it nevertheless may not be applied to produce inconsistent standards. If the two regimes were permitted to clash, the inevitable effect would be to discourage the uniformity, finality and enforceability sought by Congress and to encourage clogging of the federal courts by those seeking to impose different standards.

The district court and the court of appeals misapplied this Court's simple acknowledgement of coexistent common law and statutory remedies as a mandate for development and expansion of federal common law in the face of a comprehensive congressional program to control water pollution.

As the court of appeals recognized, it is "appropriate to give weight to Congress' expectations in adopting the [Federal Water Pollution Control] Act and the standards established by EPA pursuant to the Act." *Illinois* v. *City of Milwaukee,* 599 F.2d 151 (7th Cir. 1979). How to weigh congressional intentions and to articulate them with applicable common-law principles is the question presented to this Court for decision. The answer may bear not only on cases of interstate water pollution, but on every controversy in which schemes of federal environmental legislation and regulation cut across fields of common law, such as land use, energy, safety and air pollution.

Noticing that common-law remedies are indeed preserved under FWPCA is only the beginning of the inquiry which this Court should undertake. A determination that the federal statute does not preempt existing law, state or federal, is not tantamount to a warrant for a court to ignore the statutory framework of water-pollution control when defining or remedying common-law nuisances in this field.

In reversing the order of the district court on effluent limitations, the court of appeals acknowledged that the statutory framework has common-law implications: the order was overruled because there was no evidence to justify imposing stricter limitations than those established by EPA. 599 F.2d at 176. Thus, without precluding equitable remedies outside its own elaborate procedures, the statute operates to caution the court against fashioning such relief in the absence of a particularized justification.

Yet the court of appeals effectively ignored the same statutory framework of regulation in affirming the district court's order on overflows of raw sewage: these were to be

totally eliminated even if they complied with EPA regulations and even though Illinois did not show that the occasional discharge of raw sewage created a substantially greater risk of harm to Illinois residents than did the regular discharge of treated sewage. *Id.* at 171.

The district court's frank confession of bewilderment in the face of conflicting expert testimony, Pet. Cert. App. F-3, 4, points up a larger conceptual problem with which this Court should come to grips: the proper function of the specialized knowledge of experts in deciding questions of common-law nuisance where agency expertise is already serving to inform a regulatory scheme based on federal statute.

This particular problem, which again has implications far beyond the regulatory scheme involved in this case, can be illuminated by considering the rationale supporting the doctrine of primary administrative jurisdiction, which speaks to an analogous concern. Recently, in holding that a proceeding under the Sherman Act should be stayed until an administrative agency considered whether a commodity exchange rule was valid under a regulatory statute, this Court reasoned that "determination [of facts] will be of great help to the antitrust court in arriving at the essential accommodation between the antitrust and the regulatory regimes." *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, 307 (1973). The Court observed that the trial court would "be in a position to make a more intelligent and sensitive judgment as to whether the antitrust laws will punish what an apparently valid rule of the Exchange permits" if the agency first passed on the precise question within its jurisdiction. *Id.* at 307-308.

In *Ricci,* the precise reach of the Sherman Act's broad language was to be defined by the antitrust court in light of agency articulation of the narrower regulatory regime. In the case at bar, the court's understanding of the merits of the common-law claim would have been materially assisted by

EPA development of a factual record on the possible dangers of Milwaukee sewage to Illinois residents. Although Illinois invoked the enforcement procedures of the pre-1972 Act, it did not seek relief within the terms of FWPCA by requesting a veto or modification of the discharge permits. The trial court, therefore, had to adjudicate the claim without prior agency consideration of the specific factual question. Accordingly, in *Ricci* terms, the court was in a poorer position to make an informed judgment as to whether the common law should enjoin what the regulations apparently permit.

In the absence of agency findings on the very point at issue, a court should be reluctant to expand common-law rights or remedies in a field where common-law and regulatory regimes must be accommodated. Indeed, this Court might conclude that where a statutory scheme of water-pollution control is operating, the common-law judge should not disturb uncontested administrative decisions—like the decision to issue a permit to Milwaukee allowing occasional raw-sewage overflows into Lake Michigan—without a particularized showing of necessity. Such a conclusion would in no way abridge common-law rights in contravention of FWPCA section 505 (33 U.S.C. § 1365), but would place the burden of proof squarely on the plaintiff, where it belongs. *See, e.g., North Dakota* v. *Minnesota,* 263 U.S. 365 (1923). In particular, this would simply require application to a nuisance question of the court of appeals' reasoning on the effluent-limitation remedy.

The court of appeals also found that the correct standard of proof was a preponderance of evidence. 599 F.2d at 167. The question of the standard of proof in federal common-law nuisance actions where this Court does not have exclusive original jurisdiction has never been addressed directly by this Court, although where the defendant is a state the standard of clear and convincing evidence has been applied, *New York* v. *New Jersey,* 256 U.S. 296, 309 (1921); *Missouri* v. *Illinois,* 200 U.S. 496, 520-522 (1906). In a case where expert testimony is

in conflict and where hypotheses are stacked one upon another, the outcome may turn on the standard of proof. This Court should consider whether a plaintiff—state, political subdivision, or individual citizen—should be held to the same high standard of proof where the defendant is a political subdivision of another state. The court of appeals did not explain why the working of the federal system should require a different standard in the two cases.

While the standard of proof in interstate actions should comport with constitutional principles of federalism, the substantive issue in this case may hinge on the constitutional division of labor between the courts and Congress. In general, the legislatures, not the courts, have the power to find that any risk of harm, however small, is unacceptable. Legislative definition of a nuisance need only be rational. *See, e.g., United States* v. *Ashland Oil and Transportation Co.,* 504 F.2d 1317, 1323 (6th Cir. 1974); *cf. Reserve Mining Co.* v. *EPA,* 514 F.2d 492 (8th Cir. 1975); *Hadacheck* v. *City of Los Angeles,* 237 U.S. 394 (1915). But where a statutory framework of regulation tolerates certain risks of harm, the expansion of common-law remedies to protect against the same risks interferes with the efficient operation of the regulatory scheme, upsets reasonable expectations, and requires vast expenditures without any clear hope of significant improvements in public health or safety.

2. The Decision Below Is in Conflict With Applicable Decisions of this Court Under the Federal Common Law of Public Nuisance.

Quite apart from the existence of a regulatory regime, the decision of the court of appeals poses important questions of the burden and standard of proof in federal common-law nuisance claims. In an action between states, the question of proof must be approached with "great and serious caution." *Missouri* v.

Illinois, 200 U.S. at 520. The district court and court of appeals were considerably less than cautious both in assessing the legal sufficiency of the evidence and in fixing the standard of proof.

The court below rejected the standard of clear and convincing evidence, which invariably had been applied in interstate cases, and attempted to distinguish *New York* v. *New Jersey* and *Missouri* v. *Illinois* on the grounds that these were original actions in this Court, which coped with its unaccustomed role as factfinder by setting a high standard of proof. 599 F.2d at 167. This rationale, set forth as dictum in a later case where the defendant was a private party, *Ohio* v. *Wyandotte Chemical Corp.,* 401 U.S. 493, 501 (1971), played no role, however, in the interstate cases themselves, where the standard was chosen because of the quasi-sovereign status of the parties. Although the sovereignty rationale is not literally applicable to the case at bar, *cf. Illinois* v. *City of Milwaukee,* 406 U.S. 91, 98 (1972), the substantive issue in fact involves the desire of two states, Illinois and Michigan, to control the conduct of another, Wisconsin, which issued the discharge permits to Milwaukee, in a way in which they are unwilling to control themselves or their own political subdivisions. The views of a fourth state with a direct interest, Indiana, have not been presented. The rule this Court imposed on itself in *New York* v. *New Jersey* should apply at least as strictly to lower courts which adjudicate interstate claims. Before a court exercises the extraordinary power to control one state's conduct at the instance of another, the threatened invasion of rights must be "established by clear and convincing evidence." 256 U.S. at 309. This is especially true where, as here under FWPCA, Illinois, Michigan or any affected state could seek mandatory imposition of the asserted raw-sewage overflow standard with full benefits of regulatory agency expertise simply by adopting that standard for overflow discharges within its own borders. 33 U.S.C. § 1342.

The primary issue in this case, however, is whether liability for public nuisance was properly established at all. In holding that the evidence was sufficient to support a finding that "defendants' actions pose a significant risk of injury to Illinois residents," 599 F.2d at 167—a finding essential to proving a common-law public nuisance—the court pointed to the following facts: pathogens in Milwaukee sewage probably reach Illinois waters several times a year; these pathogens may infect drinking-water supplies if treatment plants malfunction, and possibly otherwise; the pathogens may infect swimmers who come directly into contact with them. (The court did not discuss the sufficiency of the evidence supporting the finding that Milwaukee's conduct "constituted a substantial contribution to the accelerated eutrophication" of the Illinois waters of Lake Michigan. *Id.* at 169.) This brief parade of possibles constituted, in the court's view, sufficient evidence of risk of harm. It was apparently for Milwaukee to show that its conduct did *not* significantly endanger Illinois residents. This novel allocation of the burden of proof is improper under the common law, with or without FWPCA.

In *New York* v. *New Jersey,* this Court required that the nuisance be "of serious magnitude." 256 U.S. at 309. That suit was dismissed because New York failed to prove that the proposed discharges into New York Harbor would cause an increased danger of disease to New York residents. *Id.* at 309-310. In an earlier case, Missouri's claim against Illinois had been dismissed when no connection was shown between the fact that typhoid bacilli from Chicago sewage discharges probably survived the journey to the St. Louis water intake and the increase in typhoid fever deaths in St. Louis. *Missouri* v. *Illinois,* 200 U.S. at 522-526. By applying the reasoning of the court of appeals to the *Missouri* case, a court could have found sufficient evidence of nuisance merely by noting that pathogens from Chicago likely arrived in Missouri and might infect its residents. But this Court, exercising caution, did not find a significant risk of injury in such a string of commonplaces.

The holding of *New York* v. *New Jersey* was followed expressly in *North Dakota* v. *Minnesota,* 263 U.S. at 374. Finding that the plaintiff failed to sustain its burden of proof, this Court went on to observe:

> "It is difficult for a court to decide issues of fact upon which experts equal in number and standing differ flatly and when their conclusions rest on estimates upon the correctness of which the court, without technical knowledge, cannot undertake to pass. In such cases, the court looks about for outstanding facts from which the lay mind can safely draw inferences as to the probabilities." *Id.* at 385-386.

The court of appeals in the present case, rather than draw inferences as to the probabilities, either safely or rashly, apparently found it unnecessary seriously to consider probabilities at all. The parade of plausibles or possibles, expressly based on "less evidence than [Illinois] should have [produced]", Pet. Cert. App., F-10, satisfied the court's peculiar test of minimal probability and effectively shifted the burden of proof to the defendant. The approach taken by this Court has been consistently different, yet the court of appeals gave no reason for its radical departure from established principles of the federal common law of nuisance.

By contrast, in the court of appeals' reversal of the district court on the effluent limitation, we see not only a sound common-law argument, taking proper account of the relevant statutory framework, but a model of reasoning which the court of appeals ought to have applied to the overflow prohibition and to the primary question, that of liability itself.

After establishing liability on the basis of what is merely possible, the court reversed the district court's order in so far as it imposed an effluent limitation several times stricter than EPA's. The court reasoned that evidence must be given to

support the conclusion "that the relief granted is necessary to protect the complaining party from harm." 599 F.2d at 175. Although "general testimony" was offered that a stricter standard, measured in milligrams per liter, correlated with more effective chlorination, the evidence did not "show how much more effective chlorination would be a[t] 5 mg/l . . . than at 30 mg/l". *Id.* "[T]he difference may be significant or it may be *de minimis.*" *Id.* The question, in assessing the justification of the relief granted, was "whether significant benefits will result" from the higher standard. *Id.* The court noted that the evidence "consists merely of conclusions of [certain] experts and does not explain why the particular standards are necessary to protect the health of Illinois residents." *Id.* The district court's conclusion rested on "a speculative and uncertain basis." 599 F.2d at 176. Finally, the court of appeals looked to the EPA effluent limitations, holding in effect that a particularized justification was required for imposing stricter standards. Finding no justification in the record, the court did not sustain the order. *Id.*

The court of appeals' attempt to distinguish the overflow order from the effluent-limitation order is unpersuasive. The court baldly asserted that the probabilities of harm from raw sewage are significantly greater, though it is plain that the sort of particularized support the court required with respect to the effluent limitation was totally absent. 599 F.2d at 177.

The court also remarked that FWPCA itself "arguabl[y]" prohibits discharges of raw sewage. *Id.* Since Illinois sued only on a common-law theory, the intended force of this point must be to bolster the court's novel burden-shifting procedure by suggesting that it is consistent with congressional policy. We need not address the merits of the court's quite unprecedented construction of the statute, however, to argue that, while Congress or any legislature may prohibit conduct having a risk of harm without any showing of actual harm, an injunction will not issue from a court of law in nuisance cases simply as a

matter of course. *Harrisonville* v. *W. S. Dickey Clay Manufacturing Co.*, 289 U.S. 334 (1933). Generally, "if the evidence be conflicting and the injury doubtful, this extraordinary remedy will be withheld." *Parker* v. *Winnipiseogee Lake Cotton and Woollen Co.*, 67 U.S. (2 Black) 545, 553 (1863) (dictum).

Congressional intent would not be honored by expansion of common-law remedies for water pollution. The difference between legislative and judicial proscription is not merely a difference in degree. When the two regimes clash, as they have under the decisions below, the common law must be informed by the statutory program and accommodated thereto so that all parties may avoid the price of uncertainty in trying to conform to the requirements of the law.

CONCLUSION

For the aforegoing reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed to the extent that it affirmed the judgment of the district court with respect to the elimination of overflows and affirmed to the extent that it reversed the judgment of the district court with respect to effluent limitations.

Respectfully submitted,

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* We wish to acknowledge the assistance of Krista Ravenscraft, a law student at John Marshall Law School, and Jessica Oppenheim, a law student at IIT Chicago-Kent College of Law.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF NATIONAL LEAGUE OF CITIES AND UNITED STATES CONFERENCE OF MAYORS AS AMICI CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF NATIONAL LEAGUE OF CITIES AND UNITED STATES CONFERENCE OF MAYORS AS AMICI CURIAE

The National League of Cities and the United States Conference of Mayors move the Court under Rule 35 for leave to file the attached brief *amici curiae* in the above-entitled case, and in support thereof state:

1. The National League of Cities is an Illinois not-for-profit corporation organized in 1933 to assist municipalities in performing their functions. Its membership includes direct member cities, state municipal leagues and state league member cities. In all,

almost 15,000 cities and municipalities, both the largest and the smallest, are members of and participate in the activities of the National League. There are no more essential and ubiquitous participants in the Nation's waste water treatment efforts than the cities, towns, villages and boroughs which must design, construct, maintain, operate and pay for a major portion of the water and sewerage facilities of the Nation.

The United States Conference of Mayors is an organization of city governments represented through their chief elected officials, Mayors. It was organized in 1933 to promote the causes of the city, to foster responsible and effective relationships between city halls and the federal government, and to assist local governments in their responsiveness to the needs of their citizens. Municipalities, approximately 800 of which are represented by the United States Conference of Mayors, and their associated governmental entities, have major responsibilities for liquid waste treatment throughout the Nation.

2. The members of these organizations have taken steps, including planning, constructing and financing waste treatment facilities to meet the limitations on discharge of liquid wastes established by Congress in the Federal Water Pollution Control Act of 1972, as amended, 33 U.S.C. §§ 1251-1376, and by the implementing regulations issued by the Environmental Protection Agency, 40 C.F.R. Part 133.

3. The decision of the Seventh Circuit Court of Appeals, in upholding relief to plaintiff States based on principles of federal common law, grants far different and more stringent relief against the municipal defendants than that established by Congress and the Environmental Protection Agency.

4. The decision below has far-reaching consequences for municipalities, many of whom could be vulnerable to suit if it should be established that states are able to seek relief under federal common law for discharges of effluents into navigable waters at levels that are permitted and deemed acceptable under the comprehensive scheme for water pollution control enacted by Congress. The significance of this case goes far beyond the interests of the parties, with important implications for the entire national effort to abate and control water pollution from municipal sources. For this reason, it is important that the Court, as it evaluates the specific contentions of the parties, understands fully the impact the case could have on the capacities of our cities to build and operate the water treatment facilities which the federal law and regulations mandate.

5. This case presents important issues of law of direct concern to the members of the *amici curiae* organizations:

a. Does the federal common law of nuisance survive with respect to public discharges of effluents otherwise permitted under the federal statutory scheme?

b. If so, what are the appropriate parameters to guide the lower courts in determining that public nuisances exist and in fashioning remedies to be applied against public waste treatment agencies to remedy the nuisances?

While these issues will be addressed by the parties, the national perspective which the *amici* organizations can bring is broader than the interests of the parties.

6. Accordingly, the *amici curiae* seek this opportunity to make known their views to the Court and to attempt to assist the Court in determining the issues presented by this case.

7. Consent has been sought from the parties for the filing of a brief *amicus curiae* by the aforementioned organizations. Consent was refused by counsel for the State of Michigan.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF OF NATIONAL LEAGUE OF CITIES AND UNITED STATES CONFERENCE OF MAYORS AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The interests of the National League of Cities and the United States Conference of Mayors are set out in the foregoing Motion.

SUMMARY OF ARGUMENT

The *amici curiae* argue—both as a matter of law and in the interests of timely and efficient achievement

of our nationally mandated water pollution control policies—that the judicially ascertained federal pollution control standards articulated by the federal courts as the federal common law of nuisance, in the circumstances of the case at bar, are required to coincide with and thereby be consistent with the federal statutory pollution control standards.

In contrast, the courts below have fashioned common law standards which deviate substantially from and otherwise conflict (in terms of practicality and cost effectiveness, for example) with federal statutory standards and the regulations issued by the federal executive agencies.

The *amici* wish to alert this Court to the fact that promulgation by the federal courts, on the one hand, and by Congress and the federal agencies on the other, of contrasting common law and statutory pollution control standards have generated uncertainty, confusion and consequential delays in the planning, financing and construction of municipal water treatment facilities in many communities across the Nation. These uncertainties and delays, in turn, seriously jeopardize the prospects of achieving the goals and timetables mandated by Congress in the Federal Water Pollution Control Act.

Accordingly, for practical as well as legal reasons, the *amici* urge that there be one federal antipollution standard that can be relied upon by the municipalities for uniformity and finality in matters of water pollution standards. This standard should be that contemplated by the Federal Water Pollution Control Act.

ARGUMENT

A. Achievement Of National Water Quality Policies Depends Upon Clear National Standards To Guide The Actions Of Municipal Governments

The restoration and protection of the Nation's water resources and the achievement of the other goals which Congress has set out in the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376[1] are dependent in large measure upon the present and future ability of the Nation's many municipal governments to work with the federal government and to deal effectively and efficiently with water pollution in the context of the applicable federal regulations.

From the beginning, Congress has looked to the States to lead the Nation's efforts to abate water pollution.[2] Consequently, Congress has been aware of the link between progress toward national clean water goals and the methods and performance of sub-state governments. In developing the federal water programs, Congress has paid particular attention to the characteristics and needs of local governments, to the advice of

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[1] Hereafter the Federal Water Pollution Control Act, as amended, is referred to as "FWPCA" and "the Act".

[2] See, for example, the Senate Public Works Committee Report issued in conjunction with the 1972 amendments to the FWPCA:

> "For more than two decades, Federal legislation in the field of water pollution control has been keyed primarily to an important principle of public policy: The States shall lead the national effort to prevent, control and abate water pollution. As a corollary, the Federal role has been limited to support of, and assistance to, the States." S. REP. NO. 414, 92d Cong., 2d Sess. reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3668, 3669.

municipal leaders, and to the testimony offered by National League of Cities and United States Conference of Mayors.[3]

This critical role of sub-state governmental entities also explains why the *amici curiae* have a substantial and continuing interest in the questions presented here for review.

The *amici* and many of their members have participated actively in the development of the comprehensive body of federal legislation and regulation related to water pollution control. Representatives of the *amici* have testified before congressional committees during consideration of both the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 and the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified at 33 U.S.C. §§ 1251-1376 (1978)). The *amici* have also participated actively in many of the rulemaking proceedings pursuant to these Acts, 40 C.F.R. Parts 100-149.

More importantly, members of the *amici* organizations shoulder the major responsibility for implementing the ambitious program of water pollution control being

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[3] "The oversight portion of the 1971 hearings was conducted by the Subcommittee on Air and Water Pollution on February 4, 8, and 9. Among the witnesses were the Administrator of the Environmental Protection Agency and members of his staff; the Mayors of Detroit, Michigan, and Atlanta, Georgia, and representatives of the National League of Cities and the United States Conference of Mayors." *Id.* at 3671.

Also,

> "Estimates received by the Commission from the National League of Cities—United States Conference of Mayors during its hearings last year place the total national need for the next five years at more than $30 billion. The figure covers only needs already identified by local officials." *Id.* at 3673.

undertaken across the Nation in response to the federal legislation. Cities, towns, municipal sewerage agencies and specially created sanitary districts are involved in all aspects of the planning, design, financing, construction, and operation of waste water treatment facilities.

The success of these efforts, measured against the aims of the Federal Water Pollution Control Act, is dependent upon a variety of prerequisites. But there is no element, including money, which is more critical to the effectiveness of the Nation's long-term antipollution activities than reliable and clear performance standards from which the municipalities (and everyone else) can derive explicit direction as to what, in a given instance, constitutes a legal and publicly accountable response to the requirements of the national antipollution laws. To mount effective antipollution programs, city officials need to know what are the rules and what they must do to abide by them, presently and for the future.

In this context, the decisions of the courts below have enormous and far-reaching implications for municipalities. Literally thousands of towns have made political, engineering and financial decisions with respect to waste treatment in reliance on the comprehensive body of federal statutory and regulatory law which emanates from the 1972 and 1977 Acts and which now governs the waste water treatment field. If the decision of the court below is permitted to stand, the course taken by local agencies will be cast in doubt. If actions to enjoin water pollution based on the federal common law of nuisance will lie against public agencies holding valid discharge permits issued under the federal statutory scheme, these agencies will face the prospect of entirely different treatment standards being set according to the vagaries of litigation. Countless suits will be

encouraged, and the standards developed by courts will not be known until long after key decisions have been made and funds committed for those treatment modes now required by federal statute and regulations.

The ability of local agencies to rely on the substantial statutory and regulatory scheme envisioned in the 1972 and 1977 Acts is critical in light of the mutual interdependence of all major governmental systems and of the complex investment, planning and utilization decisions which must be made with regard to those systems. For example, waste water control planning is an integral and elementary part of any land use, public transportation, public facilities, and debt financing plan that local agencies attempt to undertake. The loss of that certainty which would result from an affirmance in the case at bar could contribute to a considerable loss of continuity and cohesion in local planning, development, and financing efforts, many of which are directly related to attempts to fulfill other federal policies.

If federal courts may prescribe treatment standards far more stringent than Congress has required—total elimination of combined sewer overflows, for example—municipalities will be faced with financial obligations far in excess of current capacity and expectations, and for which federal financial assistance will not be forthcoming.

If courts may order abatement above and beyond that required by statute on the basis of the relatively relaxed standard of proof applied below, and if courts may fashion remedies without regard to considerations of cost and efficiency, similarly situated communities across the country can be expected to face radically different waste treatment obligations.

For the municipalities the issues before this Court transcend the controversy between Illinois and Milwaukee. What is needed from this Court are clear and reasonable principles to reconcile the requirements of federal common law and the national statutory standards.

The *amici* urge that the federal common law of nuisance applied by the courts below conflicts with the burden of the federal regulations which stress practicability and cost effectiveness as important attributes.[4] They also argue that the common law standards articulated below are too amorphous to guide an antipollution program which is national in scope and, therefore, dependent upon explicit national standards for effectiveness. Consequently, for the reasons elaborated upon below, it is the expectation of the *amici* that the common law of nuisance, if that law is as the courts below have defined it, will operate to confuse municipal officials and thereby to militate against and delay the achievement of federally mandated clean water objectives. Moreover, it would be ironic if the achievement of the congressionally mandated clear water standards were to be frustrated by an inconsistent, albeit well-intentioned, attempt by the courts to fashion common law remedies which contemplate standards above and beyond those defined by Congress.

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[4] The FWPCA repeatedly stresses the importance of practicality and cost effectiveness. For example, all point sources must adopt the "best practicable control technology currently available" 33 U.S.C. § 1311(b)(1)(A), and the "best available technology economically achievable" 33 U.S.C. § 1311(b)(2)(A); publicly owned treatment works are required to adopt "the best practicable waste treatment over the life of the [treatment] works" 33 U.S.C. §§ 1311(b)(2)(B), 1281(g)(2)(A).

B. The Federal Common Law Of Nuisance Articulated In The Case At Bar Confuses And Conflicts With National Regulatory Policy And Standards

When in 1972 and 1977 Congress amended the FWPCA, it provided a basis for a comprehensive national regulatory scheme for the control of water pollution. The arrangement contemplated a realistic and practical approach to the problems of water pollution under regulations characterized by a substantial degree of uniformity, finality and enforceability. The federal standards adopted for the national antipollution program were intended to be consistent, final and reliable in the sense that they offered to municipal governments a firm basis for planning for the future.[5]

In contrast, the case at bar has been governed below, not by the federal statutory plan, but by something called the federal common law which, at least

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[5] The legislative history of the 1972 Amendments makes this clear. For example:

> "Except as provided in section 301(c) of this Act, [economic based variance for industrial point source from 1983 standard] the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines under subsection (b) of this section, so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations." S. REP. NO. 1236, 92d Cong., 2d Sess. reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3776, 3803.

The Courts have acknowledged this Congressional mandate for uniformity. *National Resources Defense Council, Inc.*, v. *Train*, 510 F.2d 692, 711 (D.C. Cir. 1975); *Natural Resources Defense Council, Inc.*, v. *Costle*, _____F.2d_____, _____, 10 ERC 2025, 2031 (D.C. Cir. 1977).

in the instance of nuisance, represents a flexible and pragmatic approach to the particular circumstances and wholly dependent upon the particular views of the court before which the case pends. The method is described by Justice Douglas in *Illinois* v. *Milwaukee,* 406 U.S. 91, 107 (1972):

> [F]ederal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution. . . . There are no fixed rules that govern; these will be equity suits in which the informed judgment of the chancellor will largely govern. (footnotes and citations omitted)

This rule articulated by the Court of Appeals and applied in this case came down to one deceptively cryptic sentence: "The elements of a claim based on the federal common law of nuisance are simply that the defendant is carrying on an activity that is causing an injury or significant threat of injury to some cognizable interest of the complainant." *Illinois* v. *Milwaukee,* 599 F.2d 151,165 (7th Cir. 1979). It would be difficult to disagree with this description of the common law; but given among other considerations the theoretical and tenuous nature of the proof offered and accepted by the lower courts, it would be more than difficult to extrapolate from the case at bar how this federal rule might work out in the future in other circumstances. What degree of cleanness of water comprises a complainant's cognizable interest and how dirty must be a discharge to constitute injury? These standards are at least elusive.

Consider the dilemma of a municipal officer, charged with the responsibility for planning, designing, financing, constructing and operating waste water treatment facilities, who has reviewed the federal law of nuisance as illustrated in the case at bar and now is at-

tempting to anticipate his future water treatment requirements under federal statutory and common law. It appears to him that under the federal common law of nuisance, the federal courts can reject as not controlling the experience and judgments of federal antipollution administrators and the regulations, procedures and standards of the federal statutory water pollution programs (the municipal officer's bible). And in lieu thereof it seems that the courts can and do devise their own pollution control standards under which almost any degree of pollution in the exclusive judgment of the court can be regarded as an enjoinable threat of injury to a complainant. Equally disturbing to the municipal official, when the court finds any threat of injury, it then can design, engineer and decree as a remedy any kind of treatment facility and any degree of control or treatment, within or beyond federal pollution control standards, which the court finds to be appropriate without regard for costs or cost effectiveness and unrelated to the degree of injury suffered by the complainant.

Placed in its most invidious light, the case at bar suggests to the city water treatment official that under precepts of federal common law, each federal court can invent its own federal pollution control program with no more regard for the Federal Water Pollution Control Act than the court in its judgment chooses to grant. And if the municipal official asks—what are the federal court's antipollution laws, his lawyers will tell him—there are no fixed rules that govern; the informed judgment of the court will govern. And what, he asks, if our city has fully complied with all the federal statutes and regulations? That will satisfy the Executive Branch, the lawyers will answer. But the antipollution laws of the Judicial Branch are different.

On behalf of the municipal participants in the Nation's water pollution control programs, the *amici* urge

that in the interests of more efficient, and therefore, more effective public pollution control policy the local government participants should be offered standards of performance which can be understood and which offer the virtues of reliability, uniformity and finality. The federal common law of nuisance as applied in the case at bar is not such a standard.

C. The Federal Common Law Of Nuisance Must Be Consistent With Federal Statutory Pollution Control Laws

We leave to others the argument of whether the federal water pollution control statutes have pre-empted the federal common law of nuisance—although we believe they have. *Committee for Jones Fall Sewerage System* v. *Train,* 539 F.2d 1006 (4th Cir. 1976); *Arizona* v. *California,* 373 U.S. 546 (1963). And we submit no brief on the question of whether Section 505(e) of the FWPCA, 33 U.S.C. § 1365(e) (1978) (which preserves certain statutory and common law rights and remedies involving enforcement of effluent standards) was either intended by Congress or operates to distinguish the federal common law of nuisance from the federal statutory antipollution laws and to preserve the former as a separate and distinct body of law—although we believe as a matter of congressional intent[6] and a matter of law it does neither.[7]

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[6] The legislative history of Section 505(e) is silent with respect to its intentions to preserve a separate federal common law, but the Senate Report which explains its intentions with respect to *Section 505—Citizen Suits,* notes that "Section 505 would not substitute a 'common law' or court-developed definition of water quality." S. REP. NO. 414, 92d Cong., 2d Sess. reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3668, 3745.

[7] "While the state courts are free to apply state nuisance law more rigidly, a federal court in such a local controversy may not

In essence, it is the argument of the *amici* here that given the essential character and purpose of the federal common law generally, and the scope and nature of the federal antipollution laws and regulations, the two sets of laws must be and should be reconciled and harmonized. And, for the reasons suggested earlier, we urge this result in the interests of a more effective national water pollution control policy.

The confusions created by the case at bar are engendered in part by the inconsistencies between the comprehensive FWPCA statutory standards and the standards which the court adopted to determine the rights of the parties and the remedies to be applied in the case at bar. Thus, in the view of the *amici* the controlling question is not whether the FWPCA has superseded the common law or whether Congress intended to preserve two separate and distinct federal rules, the statutory rule and the common law rule—but rather the controlling question is whether under the federal common law the "chancellor" is authorized to exercise his informed judgment exclusively and without reference to and accommodation of the federal statutory law and regulations. We think not. And we argue here that the "chancellor" must look to the FWPCA and its federal statutory standards to determine if the elements of a federal common law nuisance exist and, if they do exist, what is to be the appropriate remedy.

Typically, federal courts have developed judicially ascertained federal policy when this expedient is necessary to provide a national unity of rules in response to overriding federal interests. For example,

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turn to a supposed body of federal common law to impose stricter standards than the statute provides." *Committee for Jones Falls Sewerage System, supra,* at 1009 (footnote omitted).

the federal courts have found it appropriate to develop and apply a federal common law where federal interests in foreign affairs demanded such treatment, *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964), and where other similar essential interests of the federal government are concerned, *United States* v. *93.970 Acres of Land,* 360 U.S. 328 (1959). Likewise, a federal common law has been evolved for activities which by their nature must be uniform throughout the Nation, *United States* v. *Yazell,* 382 U.S. 341 (1966), or where it is necessary to devise federal remedies for violations of federal rights, *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964).

Accordingly, *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972) is cited as authority for the propositions, among others, that the federal common law is applied when a controversy touches the basic interests of federalism and where it is necessary to respond to an overriding federal interest and where the need for uniformity is paramount and when there is a need to develop federal remedies for transgressions of federal rights. Ludington, *The Supreme Court and the Post-Erie Federal Common Law,* 31 L.Ed.2d 1006, § 3 at 1014 n. 18, § 3 at 1016 n. 19, § 3 at 1016 nn. 3 & 7 (1973).

Of course, the legal setting of *Illinois* v. *Milwaukee* as it existed in 1972 has changed. With the enactment of the FWPCA and its comprehensive coverage of *all* point source discharges there is no longer a need for the courts to develop federal remedies. Congress has done so. Now the *federal* common law in essence emanates from the statute and exists only to fill interstices in the statute, if any.

In the view of the *amici,* all the criteria cited above as justification for a judicially ascertained federal policy

(e.g. a federal common law) are met by reference to the FWPCA and associated regulations. And so, if this Court finds, as did the courts below, that it was the intent of Congress not to curtail federal common law remedies, nevertheless a federal court reviewing the elements of a claim based upon the federal common law of nuisance must resort to the relevant statutory law in ascertaining if the activities of the defendant are causing injury to an interest of a complainant. The standard to ascertain the existence of these conditions must be found in the federal antipollution statutory scheme, rather than in the exclusive judgment of the Court.

While the Court of Appeals found that in the FWPCA the legislature offered no controlling rules or principles for this case, the court also noted that it could turn to that Act for indications of the legislative judgment on relevant issues of policy and principle. The court concluded that while relevant policies and principles were lacking, nevertheless in applying the federal common law of nuisance, "the minimum treatment standards found acceptable by Congress and the effluent limitations imposed under the system established in the Act provided an appropriate starting point." *Illinois* v. *Milwaukee,* 599 F.2d 151, 164 (7th Cir. 1979).

In *Wallis* v. *Pan American Petroleum,* 384 U.S. 63, 69 (1966), (cited by the Court of Appeals in conjunction with the foregoing) the court wrote "If there is a federal statute dealing with the general subject, it is a prime repository of federal policy and a starting point for federal common law." The starting point in the case at bar, of course, is the FWPCA prior to the 1972 amendments. But the Act has been amended twice since then and as Ludington put it: "Since the federal common law is keyed to congressional policy, it may be expected to

change with congressional policy and to grow with the increase in federal statutory law." Ludington, *supra,* § 3 at 1017 n. 17.

With these considerations in mind, we now turn our attention to the particular elements of the federal common law of nuisance manifest in the case at bar. The *amici* argued earlier that an effective national antipollution program requires the utilization of standards which are comprehensible and provide the necessary uniformity and finality to make planning into the future feasible. The Court of Appeals, in its opinion, found that in the FWPCA Congress "has established a comprehensive and detailed system for the regulation and eventual elimination of pollution discharges into the Nation's waters." *Illinois* v. *Milwaukee,* 599 F.2d 151, 162 (7th Cir. 1979). But the Court also found that the Act contemplated certain variations in standards and concluded that under the Act "it is plain that uniformity was not thought necessary." *Id.* at 162.

The *amici* urge here that while the Act may contemplate variances in standards, there is not the slightest evidence that the law contemplated two distinct and different *federal* standards—one mandated by Congress and the Environmental Protection Agency and the other invented and decreed by the courts and applied when and where the courts deem fit. But beyond this fact, the *amici* urge on this Court that the essential nature of the federal common law coupled with the comprehensiveness of the FWPCA preclude the courts from adopting common law pollution standards which are inconsistent with the statutory standards. In fact, by applying the statutory standards all the necessities which are used to explain and justify resort to judicially ascertained federal common law—the need for uniformity, the

linkage with the federal statutory scheme, the overriding federal interest and the rest are all appropriately served. And conversely, the fashioning of a federal common law rule which differs from the federal statutory rule does not meet the need for uniformity and a national rule, which need typically is the justification for the federal courts' resorting to judically ascertained federal policy—the federal common law.

Accordingly, the *amici* urge that the Court, in considering the elements of the federal common law of nuisance, and viewing activities involving the discharge of waste waters which generally meet the standards decreed by federal antipollution regulations, and particularly those discharges of waters which are authorized by and conform with a permit issued in accordance with federal laws and regulations, that such discharges not be held such an injury as will support an action for nuisance.

The *amici* also urge that given conditions and circumstances which have been found by the federal courts to constitute a nuisance, the remedies mandated by the Court must conform to the federal policies and standards expressed by Congress in and through the FWPCA. The *amici* urge that the standards imposed by the courts be no more stringent than those adopted under the federal statutes.

If this Court should find, as did the Court of Appeals, that the rules and principles expressed by Congress in and through the FWPCA will admit variations in antipollution standards, and if the Court should conclude that Congress contemplated the perpetuation of a federal common law of nuisance with a potential for variations between judicial standards and the prevailing statutory standards, nevertheless in the absence of any

overriding need for separate judicial standards, a single standard should prevail for both bodies of federal law.

To apply one standard to the case at bar would be consistent with the rationale for developing federal common law standards and would be consistent as well with the desires and intent of Congress to mount an efficient, effective and rational antipollution program which would work to foster and preserve the country's water resources.

CONCLUSION

From the viewpoint of the *amici,* the importance of the case at bar lies in its potential for delaying significantly the achievement of national clean water objectives.

The apprehensions of the *amici* are grounded in reality as the case at bar unequivocally demonstrates. The legal controversy known as *Illinois* v. *Milwaukee* has been working its way through the courts of the Nation for the better part of a decade. This time- (and money-) consuming process cannot be ascribed to the proposition that Milwaukee persists in asserting its right to pollute Lake Michigan. Rather it is clear testimony that the federal common law of nuisance as interpreted and applied by the courts below is a bad rule and that bad rules delay the achievement of national water objectives. Certainly this is what the *amici* assert.

Reduced to essentials, the water and sewage problems of Milwaukee (and Illinois) are very much like those which are confronting literally thousands of municipal communities throughout America. The differences have to do with time, size and degree. Success in dealing responsibly and effectively with these needs

and these water resource difficulties is dependent, among others, upon such basic considerations as the quality of the planning applied to these issues (including realistic appraisals of future needs), the development of practical technologies to cope with pollution, stable and reasonable laws and regulations, competence and wisdom on the part of administrators charged with the responsibility for dealing with water pollution, and the efficient use of available resources.

When viewed against these requirements, the implications of the decisions in the case at bar, carrying with them as they do a potential for disruption and confusion, are reasonable grounds for concern among municipal officials and for this Court as well. If, as it appears, the lower court's actions create uncertainty by mandating arbitrary and even quixotic standards for pollution control and mandating excessive capacities and expenditures as well, then there is a very real possibility that these court decisions will continue to be a serious impediment to national water pollution control objectives.

To lessen the risks of casual variations in pollution standards and to assure prudent use of available antipollution resources, the Nation must adopt uniform, final and reliable effluent standards. Government regulations must be characterized by uniformity, finality and enforceability. In the absence of these necessary and reasonable characteristics, the Nation's antipollution programs are likely to encounter official procrastination nurtured by uncertainty, or perhaps unnecessary waste of scarce resources, or worse, substantial deterioration of water resources.

The Court should be aware of and alert to these very real possibilities. This case affords an opportunity to

declare the supremacy of statutory standards and thereby to respond to the pressing need for reasonable certainty and reliability in these matters.

Respectfully submitted,

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v.

PEOPLE OF THE STATE OF ILLINOIS, AND PEOPLE OF THE STATE OF MICHIGAN,
RESPONDENTS.

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No. 79-408.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1979.

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
PETITIONERS,

v.

PEOPLE OF THE STATE OF ILLINOIS, AND PEOPLE OF THE STATE OF MICHIGAN,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief of Amicus Curiae, New England Legal Foundation, in Support of Respondents.

Interest of Amicus Curiae.

New England Legal Foundation (NELF) is a non-profit, tax-exempt corporation, organized and existing under the laws of the Commonwealth of Massachusetts for the purpose of representing the public interest of the people of the six New England states in judicial or administrative proceedings which affect the economy and environment of New England. Policy for NELF is established by a Board of Directors composed of citizens, a majority of whom are attorneys, from each of the New England states.

NELF has long been interested in the proper accommodation of both public and private interests in the maintenance of a healthful environment and the stimulation of a sound economy. The purchase of industrial development at the expense of environmental protection provokes a need for a determination of the appropriate balance between the competing interests, and the equitable apportionment of the costs of the solution chosen. In an effort to help define that proper and equitable balance, NELF has actively participated in numerous administrative and judicial proceedings treating these issues.

NELF is also the primary party plaintiff in *New England Legal Foundation v. Costle,* 475 F. Supp. 425 (D.Conn. 1978), *aff'd in part, reserved in part,* — F. 2d — (2d Cir. May 20, 1980). That case involves allegations of harmful interstate air pollution, and one cause of action under the federal common law of nuisance closely analogous to the case at bar has been reserved for further briefing and judgment by the Second Circuit Court of Appeals, pending the decision of this Court in the instant case. This Court's ruling, therefore, is likely to have a direct bearing upon the outcome of *New England Legal Foundation v. Costle,* and upon the rights of NELF and its co-plaintiffs in that litigation.[1]

NELF believes that federal pollution control statutes dealing with both air and water emissions were intended by Congress only to provide a uniform minimum level of pollution control throughout the fifty states, but without infringement of the common law right of each state or municipality to control activities affecting its air, land, or waters, insofar as the exercise of such right shall not interfere with the federally

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[1] The named plaintiffs in that case include NELF, Connecticut Business and Industry Association, Connecticut Conference of Municipalities, 31 separately named Connecticut municipalities, and 3 individual citizens of the state.

mandated minimum level of control. That right is rooted in the basic tenets of our federalist system and the fundamental doctrines of property use.

New England Legal Foundation supports the decision of the Seventh Circuit Court of Appeals in the case at bar, and respectfully urges its affirmance.

Summary of Argument.

When *Illinois v. Milwaukee,* 406 U.S. 91 (1972) ("*Illinois*")[2] found federal question jurisdiction in the conflict between Illinois' assertion of its environmental and public health interests and the land use and municipal finance considerations inherent in Milwaukee's system of sewage treatment and disposal, it did so on two grounds. The Court found a federal interest in the intergovernmental nature of the conflict, as well as in the national environmental interest expressed in various federal environmental legislation.

NELF contends that neither facet of the common law right recognized by this Court in *Illinois* has been preempted or otherwise limited by subsequent statutory amendment or federal regulation, except insofar as such enactments may offer guidance in the creation of a remedy consistent with federal policy. NELF does not believe that the remedy prescribed by the District Court and modified by the Circuit Court is inconsistent with the expressed federal policies of protecting the public health and the national environment, and of preserving the rights of states to set water quality standards more stringent than the uniform federal minimum

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[2] Prior decisions in the instant litigation will be referred to as follows: *Illinois v. Milwaukee,* 406 U.S. 91 (1972), as "*Illinois*"; *Illinois v. Milwaukee,* 4 E.R.C. 1849 (N.D. Ill. 1972), dealing with questions of jurisdiction and venue, as "*Illinois II*"; and *Illinois v. Milwaukee,* 599 F. 2d 151 (7th Cir. 1979), the decision presently before this Court on review, as "*Illinois III*".

standards. NELF supports the arguments on personal jurisdiction and venue advanced by the Respondents herein, and espoused by the Courts in *Illinois II,* 4 E.R.C. at 1850, and *Illinois III,* 599 F. 2d at 155-57, but will not present further argument on these issues. NELF takes no position on the evidentiary support for the factual finding of nuisance, nor on the propriety or adequacy of the equitable relief granted.

In enacting the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251, *et seq.,* Congress intended to continue the system of cooperative federalism previously relied upon to control pollution of interstate and navigable waters, while increasing the federal demands upon and inducements to the states more actively to assume their front-line role in the process. It was made amply clear throughout the Act, and particularly in §§ 505(e), 510 and 511, that neither aspect of the federal common law recognized in *Illinois*—neither the federal concern nor the federal relationship implicated by the allegations of pollution of navigable waters—was intended to be preempted by the statute.

Several aspects of the federal common law of nuisance set forth in *Illinois* remain subject to some uncertainty and disagreement in the courts. Whether the presence of interstate effects must be alleged, or whether pollution of navigable waters or ambient air is sufficient—whether suit must be instituted by a state, or whether it is available to a municipality or a private party—whether the interests of a state must be implicated in such a suit, or whether the national environmental interest may be invoked by a private party—all are questions whose answers may not be essential to a closely drafted decision in the case at bar. NELF, however, respectfully submits that the Court's decision in this case presents an opportunity to amplify the reasoning of *Illinois,* and to offer guidance to the Circuits on these issues of differing interpretation.

Argument.

I. The Federal Common Law Provides a Federal Judicial Definition and Vindication of Rights in Matters of Federal Concern or Relationship.

Consideration of the effect of a statutory scheme upon a predecessor common law right and remedy suggests an understanding of the nature of the preexistent right and the purpose and authority of the subsequent statute. NELF submits that analysis of both the common law right asserted by this Court in *Illinois* and the Federal Water Pollution Control Act compels the conclusion that the cause of action expressed by *Illinois* was not preempted or otherwise restricted by the statute.

Far from promulgating a federal common law of nuisance for ambient or interstate pollution, the opinion of Mr. Justice Douglas in *Illinois* recognized that the controversy alleged fell among those specialized areas in which the federal common law survived the general limitation of *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938). *Illinois* found justification for the exercise of the federal judicial lawmaking power in the presence of "matters of federal concern ['where there is an overriding federal interest in the need for a uniform rule of decision,' at 105 n.6] and relationship" ['or where the controversy touches basic interests of federalism,' *id.*]. 406 U.S. at 99. The issues of "federal concern" are derived from statutory expressions of federal interest in pollution, the environment, and the nation's interstate and navigable waters, and ultimately rely upon the delegation of power contained in the Commerce Clause, Article I, § 8, of the Constitution. The "basic interests of federalism" recognized in *Illinois,* however, are not expressly stated in the Constitution, but are implicit throughout and lie at the very roots of Article III.

They are descendant of the quasi-sovereign powers reserved by the states, and the necessary provision of a peaceful means for the ordering of those powers required by the creation of a union between the states.

The *Illinois* court not only reaffirmed the existence and authority of the federal law to resolve conflicting exercises of the state police power, but properly broadened the scope of that area of federal concern to accommodate the national interest in the maintenance of environmental quality, an interest which has found increasing expression in the federal environmental statutes of the past decade.

A. *The Federal Common Law Is Available to Ensure the Rights of a State to the Exercise of Its Police Powers, and to the Control of Its Own Ecological Destiny, Against Impairment from Outside Sources.*

The "controlling principle" cited by Mr. Justice Douglas in *Illinois*—that the federal judicial lawmaking power applies to "matters of federal concern and relationship"—was taken from *State of Texas v. Pankey,* 441 F. 2d 236, 240 (10th Cir. 1971). The matter of "federal concern and relationship" which *Pankey* found to be at the root of the Texas-New Mexico caterpillar war was the improper impairment of the natural resources and environment of a state by acts done outside its boundaries. The Court there relied upon the federalist notion—*federalist* in that it concerns the structure of the federation and the ordering of the interrelations of its constituent members, rather than *federal* in the sense of concerning the delegated central governmental powers[3]—that each state retains a quasi-sovereign right in the conditions of its land, water and air. When the exercise of that right may collide with the exercise of a similar right by another state,

[3] Note, *Federal Common Law and Interstate Pollution,* 85 Harv. L.Rev. 1439, 1444 (1972).

the very nature of the federalist system, even in the absence of any specific Constitutional delegation of authority, demands that the courts of the central government determine the proper and peaceful resolution of the conflict. It is as much the nature of the party as the right asserted which by this analysis evokes the demand.

The *federalist* underpinning for the exercise of the federal common law in interstate pollution disputes evolved from the jurisdiction of the federal courts over questions of state sovereignty inherent in boundary disputes. *Missouri v. Illinois,* 180 U.S. 208 (1901). The Constitutional provision relied upon in these cases was the Article III grant of exclusive Supreme Court jurisdiction in suits involving states, and the rationale for federal equity jurisdiction was offered in *The Federalist No. 80*:

> Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of Federal superintendence and control.
>
> . . . And if it be a just principle that every Government *ought to possess the means of executing its own provisions, by its own authority,* it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the National Judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal, which having no local attachments will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded. (Emphasis in original.)[4]

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[4] *The Federalist No. 80* (A. Hamilton) at 555 (Dawson ed. 1863); *and see,* Woods and Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the Wyandotte Case,* 12 Ariz. L.Rev. 691, 700-01 (1970).

It was more than mere impartiality of the forum which the framers found to require federal jurisdiction. It was the need to provide for the peaceful ordering of relations between the states, and to protect the right of each to assert authority over its own domain, by providing for a federal rule of law to accommodate both conflicting rights, that was at the heart of these early interstate disputes.

The right itself, while variously phrased, was felt to adhere to the state, and the ultimate justification for the exercise of the federal lawmaking power was as the federalist alternative to armed conflict. In *Missouri* it was the state's derivative right, as *parens patriae,* to protect the public health of its citizens which provided grounds for federal equity jurisdiction. The state was considered the proper party to assert the collective rights of its populace to health and comfort, as well as of its communities to prosperity. *Id.* at 241; *see also, Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 505-06 (1971) (Douglas, J., dissenting).

And where the natural resources of the state are threatened by harmful extraterritorial conduct, the state's quasi-sovereign power to determine the utilization of those resources has also been recognized. In *Georgia v. Tennessee Copper Company,* 206 U.S. 230 (1907), the leading early case of interstate air pollution, Mr. Justice Holmes articulated the right of a state to the control of its ecological destiny.

> In that [quasi-sovereign] capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. 206 U.S. at 237.

Although *Tennessee Copper* first expressed this ecological interest, the source of the right to protection of that interest in the federal courts was there only suggested as being federal in nature, from the federalist concept of a peaceable union

making forcible abatement impossible. The union did not, it was held, imply that such quasi-sovereign interests were forsaken, only that they must be determined by federal courts. *Id.* at 237.

The state, however, is not the only party competent to assert rights which, from this *federalist* perspective, call for resolution by the federal judiciary. *Hinderlider v. La Plata River & Cherry Creek Ditch Company,* 304 U.S. 92 (1938), issued on the same day that *Erie* restricted the federal common law in typical diversity cases, and also authored by Mr. Justice Brandeis, carefully preserved the federal common law in cases requiring not only an impartial forum, but an impartial rule of law, as well. The quasi-sovereign rights of a state demand protection by a federal rule of law, and where those rights are implicated even by a private party plaintiff, a federal common law will be applied. 304 U.S. at 110.

While the implication in *Tennessee Copper* was strong, it was not until *Pankey* that the ecological right was clearly recognized as having a federal source. Based upon the reasoning of *Tennessee Copper* and the subsequent caselaw, the *Pankey* court held that the ecological right of a state against improper impairment from outside sources is a matter of federal concern or relationship, and therefore provokes application of a federal common law. 441 F. 2d at 240.

It was this *federalist* aspect of the federal interest which necessarily lay at the heart of *Illinois,* as in truth that was the case directly presented to the Court by the allegations. An asserted state right—as *parens patriae* to protect the public health, or as quasi-sovereign over the control of its own environment—was being impaired by conduct having interstate consequences. *Illinois* held that a conflict over rights in interstate streams, just as does any dispute implicating the question of apportionment of interstate waters or the setting of interstate boundaries, presents *federalist* issues requiring

resolution by the application of the federal common law. *Id.* at 105. But *Illinois* looked beyond that *federalist* interest, and found a *federal* interest justifying application of the federal common law, as well.

B. *The Federal Common Law Is Available to Articulate the Federal Interest in Maintaining the Purity of the Nation's Air and Waters.*

While recognizing that a federal common law has been applied to matters of federal concern or relationship, *Pankey* relied exclusively upon *Tennessee Copper* as the expression of the applicable right, and thereby seemed to pin its holding primarily to the existence of a federal relationship. There is no discussion of the independent national environmental interest evinced by federal statutes in the area, and it is not until Mr. Justice Douglas' decision in *Illinois* that environmental protection is considered a matter of federal concern, as well as relationship.

The federal interest in the maintenance of the purity of the nation's air and waters was anticipated in *Missouri v. Illinois* in its reference to *In Re Debs,* 158 U.S. 564, 586 (1895), in which the Court held the federal equity jurisdiction available to abate a public nuisance,

> "whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the nation, and concerning which the nation owes its duty to all the citizens of securing to them their common rights. . . ." 180 U.S. at 236.

Debs found the existence of a nuisance in the interference with federal interests expressed in statute, for it is only to the extent that federal policy regarding the delegated powers of the central government may be found in federal statutory expression that they may be asserted. That is not, however, to

say that federal statute contains the only means of effectuating the federal policy expressed therein.

In *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943), the Court referred to the federal rather than state common law to determine the rights of the United States in matters affecting payments made by government checks. When the government exercises a Constitutional power, its rights must be determined by a federal common law gleaned from the general duties and rights described in the applicable statutes and regulations. *Id.* at 366. *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957), stated the principle even more clearly. In determining the source of the substantive law to be applied in cases of federal common law rights, Mr. Justice Douglas concluded that the courts must look to the general policies of the applicable federal laws, and fashion inventive remedies which best effectuate those policies. *Id.* at 456-57.

The progression was continued in *Illinois* and applied to the federal interest evidenced in recently enacted environmental legislation. Federal control over the nation's navigable waters, justified by the Commerce Clause, supports statutory assertion of the federal interest in the purity of the nation's waters. The statutes, however, again do not offer the exclusive means of effectuating federal policy. Nor is the federal policy expressed in the Federal Water Pollution Control Act its exclusive expression, as different aspects of federal concern may (as in the instant case) result in differing policy statements. The courts must look to the varying federal interests in the quality of navigable waters, and create from them an application of federal law which best effectuates those interests. *Id.* at 101-08.

The nature of the federal environmental interest itself was best expressed by Mr. Justice Douglas in *Minnesota v. Reserve Mining Co.,* 419 U.S. 802, 804 (1974), in his dissent on applications for temporary relief. Echoing the theme of

Debs that the national government has a responsibility to the people—"the sovereign power in this Nation"—to secure to them their common rights, he recognized the truly national interest in the quality of this nation's waters.

> I am not aware of a constitutional principle that allows either private or public enterprises to despoil any part of the domain that belongs to all of the people. Our guiding principle should be Mr. Justice Holmes' dictum that our waterways, great and small, are treasures, not garbage dumps or cesspools. *Id.* (footnote omitted, citing *New Jersey v. New York,* 283 U.S. 336, 342 (1931)).

This Court's decision in *Illinois* represents the confluence of several streams of legal precedent: the recognition of the ecological rights of a state (*Tennessee Copper* and *Pankey*); the survival of the federal common lawmaking power for the determination of rights in interstate waters (*Hinderlider*); and the application of federal, rather than state, judicial lawmaking authority in matters presenting federal interests as reflected by statute, or in matters considered "intrinsically federal" because of their need for a uniform rule of decision, or because they touch upon basic interests of federalism (*Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 425-27 (1964)). *Illinois,* 406 U.S. at 104-05.

The federal interest in interstate pollution disputes recognized in *Illinois* is twofold. The *federalist* component, based upon the retention of certain quasi-sovereign rights by the states, calls for the application of federal law peacefully to resolve conflicts in the exercise of those rights. The *federal* component, based upon the delegated authority of the central government to control matters affecting interstate commerce, requires the application of federal common law to accomplish the purposes of federal statutes and regulations concerning navigable waters. In the case at bar, both components are present, and both were properly contemplated in the exercise of the District Court's equity jurisdiction.

II. The Federal Common Law Applicable in the Instant Case Was Not Preempted by the Federal Water Pollution Control Act.

The Federal Water Pollution Control Act, 33 U.S.C. §§ 1251, *et seq.* (FWPCA), is not intended to be the exclusive pronouncement of policy regarding the nation's navigable waters. Congress not only specifically declined to foreclose a state's exercise of control over its own navigable waters, insofar as such exercise may not conflict with the federal scheme, but it also provided its own broader statement of federal environmental principles in the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.* (NEPA). Various other federal laws provide expressions of the national interest in the protection of fish and wildlife resources. *See, Illinois,* 406 U.S. at 102. Absent Congressional statement of supersession by the FWPCA, that statute must be interpreted together with other statutory expressions of federal interest in the navigable waters in order to discover the federal policy applicable to the instant case.

A. *Federal Statutes Are Not To Be Construed as Preempting the Federal Common Law Or the State Rights Vindicated Thereby Absent a Clear Expression of Preemptive Intent.*

It is, of course, axiomatic that the Supremacy Clause[5] empowers Congress to preempt state action in an area of federal concern. But it is also plainly given that the states retain broad power to legislate protection for their citizens in matters of local concern, such as public health. *Great Atlantic & Pacific Tea Co. v. Cottrell,* 424 U.S. 366, 371 (1976).

That state action which is designed to control pollution is a valid exercise of the police power to protect the public health was acknowledged in *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 442 (1960):

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[5] U.S. Const. art. VI, cl.2.

> The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government.

The Court further intimated that the federal air pollution control act then in effect provided for just such concurrent action in this area of primarily state and local concern.[6]

Such a system of cooperative federalism was also found to be at the heart of the Water Quality Control Act of 1970, 33 U.S.C. §§ 1151, *et seq.*, the predecessor to the FWPCA, and defeated a claim of federal preemption of simultaneous state regulation. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), *reh. denied*, 412 U.S. 933 (1973). Nor is state law that prohibits more than federal law necessarily in conflict with, and preempted by, federal law, since the toleration of certain conduct by federal law does not imply an affirmative policy in favor of that conduct. *Connecticut v. Levi Strauss & Co.*, 471 F. Supp. 363, 367 (D. Conn. 1979). The courts have, moreover, been especially reluctant to find

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[6] In so doing, the Court relied upon the following Congressional expression of federal policy found at 42 U.S.C. § 1857:

> "[I]t is hereby declared to be the policy of Congress to preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution. . . ." 362 U.S. at 445-46.

The comparison with the statement of policy in the Federal Water Pollution Control Act is instructive:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution. . . . § 101(b), 33 U.S.C. § 1251(b).

federal preemption of the state police power. There has developed, instead, the doctrine that the exercise of the historic police power of the states is not to be superseded by federal statute unless such was the clear and manifest purpose of Congress. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978). Statutes which invade the common law are similarly strictly construed, and are read with a presumption favoring the retention of long-established and familiar principles. *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). Far from presenting a situation where state action would stand as an obstacle to the accomplishment of federal objectives, such as the Court found dispositive in *Ray*, at 165, the case at bar concerns state action designed to accomplish purposes which are not only permissible under, but are specifically endorsed by, the applicable federal laws.

B. *The Federal Water Pollution Control Act Displays a Clear Congressional Intent to Preempt Neither the State Police Power Nor the Federal Common Law.*

That Congress well knew its ability to preempt state law by the FWPCA, should it so chose, is clear from § 312(f) of the Act,[7] in which Congress specifically chose to do so with regard to marine sanitation devices. The statute, however, plainly declares its intention to preempt neither state nor national interests—neither the *federalist* nor the *federal* source of the common law—by the breadth of its preservation of all rights under any common law:

> Nothing in this section shall restrict *any right* which *any person* (or class of persons) may have under *any statute*

[7] 33 U.S.C. § 1322(f): "[N]o State or political subdivision thereof shall adopt or enforce any statute or regulation of such State or political subdivision with respect to the design, manufacture, or installation or use of any marine sanitation device on any vessel subject to the provisions of this section."

> *or common law* to seek enforcement of any effluent standard or limitation or to seek *any other relief* (including relief against the Administrator or a State agency). § 505(e), 33 U.S.C. § 1365(e) (emphasis supplied).

This provision received little explanation in the legislative history, both bodies being in remarkable agreement.[8] The Senate Report, however, displays the true intent behind the subsection. The Citizens Suit provision, § 505 of the Act, was drawn as a private attorneys general measure in an effort to broaden enforcement of the limitations and standards imposed by the Act. H.Rep. No. 92-911, 92d Cong., 2d Sess., at 134 (March 11, 1972) (hereinafter "H.Rep."), reprinted in "A Legislative History of the Water Pollution Control Act Amendments of 1972," (hereinafter "Legislative History") v.1, 1973, at 753. Consistent with the Act's stated policy encouraging citizen participation as a public service,[9] the citizens suit provision extends enforcement authority by creating a private right of action and adopting the standing test set forth by this Court in *Sierra Club v. Morton,* 405 U.S. 727 (1972). S. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess., at 145-46 (Sept. 28, 1972) (hereinafter "Conf. Rep."), reprinted in Legislative History, v.1, at 281. The section is drawn to permit an individual to bring an enforcement action without having to meet the prerequisites, such as the jurisdictional damage amount, of an extra-statutory private action. If the prerequisites can be met, however, the extra-statutory action remains freely available, including any common law tort action. *See,* S. Rep. No. 92-414, 92d Cong., 1st Sess., at 81 (October 28, 1971) (hereinafter "S. Rep."), reprinted in Legislative History, v.2, at 1415. While the citizens suit provision creates a limited citizens right and remedy where there

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[8] Both H.R. 11896 and S.2770 contained verbatim the provision enacted as § 505(e).

[9] *See,* § 101(e), 33 U.S.C. § 1251(e).

otherwise may have been none,[10] § 505(e) makes clear that it does not intend thereby to extract in return any citizens' rights or remedies which otherwise are available.

The intent behind § 505(e) is also illumined by the realization that the provision was adopted verbatim from the Clean Air Act Amendments of 1970,[11] and was intended to have the same effect. *N.R.D.C. v. Train*, 510 F. 2d 692, 701 n.46 (D.C. Cir. 1975). It was that Clean Air Act citizens suit section, and presumably its savings provision identical to that of § 505(e), on which this Court relied in *Washington v. General Motors Corp.*, 406 U.S. 109 (1972). In that decision, issued on the same day that this Court affirmed the existence of federal common law rights when dealing with air or water in their ambient or interstate aspects, (*Illinois*, 406 U.S. at 103) and authored by the same member of the Court, it was declared that the states retain broad residual powers despite the federal pollution control scheme, and that citizens and states may bring suit to enforce other statutory and common law rights. 406 U.S. at 115 n.4.[12]

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[10] There is some authority, however, for the proposition that a private right to enforcement of the statute exists without benefit of the citizens suit provision, in part because pollution of interstate or navigable waters is an area of federal concern as to which an implied private remedy in the federal courts should not be denied. *National Sea Clammers Association v. City of New York*, 616 F. 2d 1222, 1230 (3d Cir. 1980), *petition for cert. filed*, 48 U.S.L.W. 3752 (May 20, 1980), and cases cited; *but see contra, City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F. 2d 1008, 1016 (7th Cir. 1979), *cert. denied*, — U.S. —, 48 U.S.L.W. 3436 (January 8, 1980).

[11] 42 U.S.C. § 1857h-2(e). The identical provision is now codified at 42 U.S.C. § 7604(e).

[12] The juxtaposition of the two decisions cited indicates that federal, as well as state, common law is preserved by § 505(e). Petitioners' contrary argument, at note 9, pages 21-22 of their Brief, based upon the chronology of legislative action, ignores the fact that the drafters of the FWPCA in 1972 were fully cognizant of the significance of the decisions in *Sierra Club v. Morton*, 405 U.S. 727 (1972), which was delivered on April 19, 1972, and *Getty Oil Co. v. Ruckelshaus*, 467 F. 2d 349 (3d Cir. 1972), which was handed down

The broad savings provision of § 505(e) is not the only indication of non-preemptive intent found within the FWPCA. In § 510, entitled "State Authority," Congress specifically sought to preserve the rights of the states to the unfettered exercise of their historic police powers with regard to pollution of interstate or navigable waters, except insofar as such exercise might interfere with the federally mandated minimum controls:

> Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation . . . is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation . . . which is less stringent . . . or (2) be construed as *impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.* 33 U.S.C. § 1370 (emphasis supplied).

Whether a state may choose to exercise its "right or jurisdiction" over its own water quality by means of statutory state-wide standards, or case-by-case protection of the public health, it is clear that Congress intended not to intrude upon that decision, provided that the minimum control levels established by the Act are not contravened. Here again is a provision of the Act upon which there was complete har-

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on September 12, 1972. Senate Consideration of the Conference Report, October 4, 1972, reprinted in Legislative History, v.1., at 161, 179, 181. The decisions in *Illinois v. Milwaukee* and *Washington v. General Motors Corp.* were issued on April 24, 1972, and the FWPCA was enacted on October 18 of that year.

mony between the two legislative bodies, and the House Committee report underscores the obvious non-preemptive meaning of the broadly phrased language:

> The Committee considers section 510 to be of extreme importance in assuring the States of the right to adopt or enforce provisions at least as strict as those established in this legislation. Thus, the Committee rejected in most instances suggestions for preemption by the Federal Government and preempted the States only where the situation warranted it based upon the urgent need for uniformity such as in section 312(f) relating to marine sanitation devices. H.Rep., *supra* at 136.

Neither did Congress intend the FWPCA to offer the exclusive statement of national policy—the *federal* rationale for the common law applied in the case at bar—in the quality of interstate or navigable waters. In yet another measure of the Act's limited reach, § 511 specifically declines any limitation on the authority or functions of any federal officer or agency under any other law not inconsistent with the Act.[13] That a member of the judicial branch of government is an "officer" of that government is apparent from the statement of the Conference Committee that § 511 "preserves the authority of other Federal laws which are consistent with this Act." Conf. Rep., *supra* at 148. No distinction is made between statutory and judicial law. Not only those Congressional statements of federal policy contained in other legislation touching the navigable waterways (*see, Illinois,* 406 U.S. at 101-02), but also federal law fashioned to accommodate competing statutory policies, are preserved by, insofar as not inconsistent with, the Act.

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[13] "This Act shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this Act; . . ." § 511(a), 33 U.S.C. § 1371(a).

Moreover, in the present instance the judicial law applied by the federal court will in fact operate to resolve an inconsistency with the Act and to advance the federal purposes, rather than to clash with them. The maintenance of a public nuisance—the finding of fact from which the legal analysis herein must start—is plainly inconsistent with the purposes of the Act as expressed in § 101(a), 33 U.S.C. § 1251(a), as well as with the broad federal environmental purposes set forth in NEPA, 42 U.S.C. § 4321, *et seq.* Abatement of the nuisance will resolve the inconsistency, while permitting the exercise of state authority guaranteed by § 505(e), and without contravention of the minimum control levels prescribed by the Act.

The Federal Water Pollution Control Act is built upon a cooperative federalist scheme which recognizes the primary rights and responsibilities of each state to control pollution within its own domain. That principle is evoked in the policy declaration of § 101(b), *supra* n.6, and echoed throughout the Act. In the carrot-and-stick approach characteristic of various federal/state programs, and particularly those in which the federal interest intrudes upon the traditional state police power, the Act provides for minimum federal water quality standards and effluent limitations,[14] induced compliance by federal guidelines and grants,[15] and insured by joint federal/state/citizen enforcement.[16]

The "uniformity" which was provided in the FWPCA is a uniform *floor* of pollution control, not a uniform *level* of control. By its very use of the phrase "effluent limitations," the Act plainly intends to set only a minimum rate at which the nation will move toward the goal of zero discharge of pollutants, while allowing each state the right to exceed that pace.

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[14] §§ 301, 303, 306, 307; 33 U.S.C. §§ 1311, 1313, 1316, 1317.
[15] § 304, and Title II; 33 U.S.C. § 1314, and Subchapter II.
[16] §§ 309, 505; 33 U.S.C. §§ 1319, 1365.

See, Statement of Russell Train, Chairman, Council on Environmental Quality, on H.R. 11896; reprinted in Legislative History, *supra* v.2, at 1116.

C. *Where States Have an Express Statutory Right to Set Varying Pollution Control Standards, Only a Federal Common Law Means of Resolving an Unreasonable Interstate Interference with Those Standards Can Prevent the Likelihood of Interstate Industrial Competition at the Expense of Environmental Quality.*

It has also been argued that a uniform level of control, whether or not required by the Act, is necessary to prevent interstate industrial competition, with economic advantages adhering to the state which least aggressively presses costly controls on industry. While a uniform mandatory level of pollution control rather than a minimum level would operate to prevent industrial competition, for a variety of reasons Congress has set only a minimum, and has preserved the states' flexibility beyond that level. It is in fact such a flexible system which, without an equitable means of accommodating its interstate effects, provokes industrial competition. And in view of the flexibility permitted by the FWPCA, it is only the federal common law which can, in a given situation, discover a measure of uniformity among varying standards.

The potential inequities of a system which provides for flexibility without a means of resolving conflicts are most apparent within the fact pattern alleged in *New England Legal Foundation v. Costle.* A New York utility operating under a state-granted and EPA-approved variance consumes 2.8 percent sulfur fuel, thereby saving its consumers an estimated 52 million dollars. The utilities are situated on the north shore of Long Island, and their emissions are predictably carried by prevailing winds into Connecticut, allegedly causing harm to the public health. Connecticut's rate-payers must support the

higher fuel cost of the 0.5 percent sulfur limitation in that state, while not even enjoying the environmental and public health benefits of the low-sulfur limit. Connecticut's industries either suffer the increased fuel cost, to their competitive detriment, or succumb to the competition and relocate to a less stringently controlled area.

Industrial development and its economic benefits are unavoidably purchased at the cost of some environmental impacts. The federalist free enterprise system upon which this country is based demands the freedom of each state to make that value judgment, and the federal air and water pollution statutes have not withdrawn that right from the states except where the minimum standards would be contravened. To the extent that the consequences—economic, environmental or otherwise—of industrial conduct are visited entirely upon an emitting state, that state is legislatively competent to regulate such conduct on behalf of its citizens. But when the externalities of industrial conduct touch a neighboring state, and may in fact affect the way in which the industrial-environmental balance is drawn in that state, the receiving state must suffer the consequences without the opportunity to have exercised its own judgment on the value of that conduct. While the receiving state is legislatively incompetent to weigh the benefits of the conduct, the emitting state is equally incompetent to judge its costs, as they are visited upon the citizens of its neighbor.[17]

In these dense and tangled thickets of intertwining social, economic, and environmental values, implicating such often divergent and vital interests as private property rights, the public health, and the historic police power of the states, are

[17] Nor has the receiving state, by any conduct of its own, subjected itself to the jurisdiction of the emitting state or otherwise conceded the decision-making process to it. The superior authority of the emitter is purely an accident of geography.

made many of the most critical quality-of-life decisions which society faces. Our federalist system leaves the right to make such decisions, except where specifically assumed by the central government, with the states. When the rights of two states so collide, the only jurisdiction competent to resolve the conflict is the federal equity jurisdiction.

III. Subsequent Judicial Interpretations of the Rule of *Illinois* Have Seen Some Variation Which Warrants Clarification by This Court.

The subsequent history of *Illinois* as case precedent has provoked neither a rash of federal common law pollution suits nor a violent clash of interpretations between the Circuits. There has been some disagreement over the scope of the federal interest recognized in *Illinois,* but no aspect of those differences would operate to deny to plaintiffs a federal common law remedy under the facts as proved in the case presently at bar.

The Seventh Circuit has most frequently interpreted the law of *Illinois,* and has enunciated certain principles also reflected by the courts of other jurisdictions. The *federalist* component of the common law rationale was recognized in *Stream Pollution Control Board of Indiana v. U. S. Steel Corp.*, 512 F. 2d 1036 (7th Cir. 1975), in which *Illinois* was interpreted as providing that the federal courts may fashion a federal common law of public nuisance to resolve controversies involving the impairment of the environmental interests of one state by sources outside its domain. *Id.* at 1039, citing *Texas v. Pankey,* 441 F. 2d 236 (10th Cir. 1971). The court there acknowledged, without deciding, the further issue of whether the federal common law extends to all navigable waters without requirement of interstate effect. It was uncertain whether jurisdiction might be supported only by

the federal interest expressed in statute,[18] or whether the national interest in the purity of interstate bodies of water[19] would suffice. *Stream Pollution Control Board,* 512 F. 2d at 1040. Without reaching an answer to the question, the court did, however, note that in several instances the federal government had been permitted to pursue such claims without allegation of a conflict between sovereign state interests. *Id.* n.9, and cases cited; *see also, United States v. Stoeco Homes, Inc.,* 498 F. 2d 597, 611 (3d Cir. 1974), *cert. denied,* 420 U.S. 927 (1975).

In its decision in the case now at bar, *Illinois v. Milwaukee,* 599 F. 2d 151 (7th Cir. 1979), the binding precedent of this Court's 1972 decision precluded any necessity for the Circuit Court to discuss the basis for the availability of the federal common law. But a detailed analysis of the FWPCA concluded, on the basis of the express provisions of the Act itself, including its amendments through 1977 and implementing regulations, that Congress had not intended to preempt or otherwise limit the availability of common law relief. *Id.* at 162-64.[20] And the court strongly intimated that the federal interest so preserved was limited neither to the existence of

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[18] Circuit Judge Oakes answered this question in *United States v. Ira S. Bushey & Sons, Inc.,* 346 F. Supp. 145, 149 (D. Vt. 1972), and 363 F. Supp. 110, 120 (D. Vt. 1973), when he held that the numerous federal laws for the control of pollution of interstate or navigable waters do not establish the exclusive means of protecting the federal interest in the quality of those waters.

[19] Judge Oakes termed this the "public interest in preserving the environmental integrity of Lake Champlain, the sixth largest lake in the country and a jewel of nature." *U.S. v. Bushey,* 363 F. Supp. at 119.

[20] *Accord, City of Evansville, supra* n.10, at 604 F. 2d 1014; *National Sea Clammers Association, supra* n.10, at 616 F. 2d 1226-28, 1233 n.31; *California Tahoe Regional Planning Agency v. Jennings,* 594 F. 2d 181, 193 (9th Cir. 1979); *Township of Long Beach v. City of New York,* 445 F. Supp. 1203, 1215 (D. N.J. 1978).

interstate effects, nor to the presence of a state as a complainant.

> We can think of no other reason for Congress' preserving previously existing rights and remedies than to protect the interests of those who would be able to show that the requirements imposed pursuant to the federal statute are inadequate to protect their interests. When the complaining party is a neighboring state, the federal common law of nuisance provides a peculiarly appropriate remedy. *Id.* at 165.

In *City of Evansville, supra,* n.10, the Seventh Circuit held that when a state's interests are implicated, the state itself need not be a party to an action brought under the federal common law by a municipality.[21] The Court again expressly declined to answer whether a private party may bring such a claim, or whether a claim may be made in the absence of interstate effect. 604 F. 2d at 1018.

What thematic variations do exist between the courts primarily involve the application of the federal common law in the absence of allegations of interstate effects. Where no interstate effect is alleged, some courts have found no federal interest to be present, and suit under the federal common law has not been allowed. *Committee for Jones Falls Sewage System, supra* n.21, at 539 F. 2d 1009; *Parsell v. Shell Oil Company,* 421 F. Supp. 1275, 1281 (D. Conn. 1976), *aff'd sub nom. East End Yacht Club v. Shell Oil Co.,* 573 F. 2d 1289 (2d Cir. 1977); *Reserve Mining Co. v. Environmental Protection*

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[21] *Accord, Township of Long Beach,* 445 F. Supp. at 1214. That the state, or *federalist,* interests might be sufficiently implicated by a non-municipal private party was confirmed in *Committee for the Consideration of the Jones Falls Sewage System v. Train,* 539 F. 2d 1006, 1009 n.8 (4th Cir. 1976), citing *Hinderlider v. La Plata.* The Third Circuit has also found a private party competent to assert the *federal* interest in interstate or navigable waters. *National Sea Clammers Association,* 616 F. 2d at 1233.

Agency, 514 F. 2d 492, 520 (8th Cir. 1975). *See also, Commonwealth of Massachusetts v. United States Veterans Administration,* 541 F. 2d 119, 123 (1st Cir. 1976). Such an analysis relies exclusively upon the *federalist* justification for the common law, and ignores the *federal* interest in the purity of all interstate and navigable waters, an interest manifested in the FWPCA, NEPA and other federal statutes, and held by Mr. Justice Douglas to provoke the applicability of the federal common law. *Illinois,* 406 U.S. at 104.

Recognition of this aspect of the *Illinois* decision was provided in *Illinois v. Outboard Marine Corporation,* — F. 2d —, 14 E.R.C. 1281 (7th Cir. 1980), in which a state was permitted to bring suit under the federal common law for nuisance caused by the pollution of interstate or navigable waters, but without allegation of interstate effects. In so doing, the Court of Appeals provided the clearest recognition yet of the *federal* aspect of the federal interest in such disputes, and the compatibility of that interest with the federal statutory scheme.

> The nation has a basic overriding federal interest in interstate and navigable waters and in developing a uniform program of protecting these national resources from pollution. The Federal Water Pollution Control Act made this interest explicit. The federal common law of nuisance fills the interstices in the Act. *Id.* at 1283.

It is that uniformity of standard in the control of pollution of interstate waters which the Third Circuit found to be justification for the application of federal common law to protect the *federal* interest even when asserted in a suit by private parties. *National Sea Clammers Association,* 616 F.

2d at 1233.[22] One purpose of the FWPCA is to protect individuals from injury related to the pollution of interstate waters, and where that federal purpose is involved even private parties may exercise the common right. *Id.* at 1229, 1234-35.

The question has also been raised whether compliance with the relevant federal statute can constitute a defense to or otherwise limit the relief available under the federal common law of nuisance. In the analogous situation presented in *New England Legal Foundation v. Costle,* the District Court dismissed the federal common law cause of action for interstate pollution for failure to state a claim. There, plaintiffs were municipalities and private parties, and the allegations of interstate effects were plainly pleaded. But the court declined to hear the matter on its merits, holding that in no event would it create an equitable remedy to proscribe conduct approved by the applicable statute, there the federal Clean Air Act. 475 F. Supp. at 441. It is that portion of the case upon which the Second Circuit has reserved judgment pending the decision of this Court in the instant case, and which is relied upon by Petitioners herein as support for the proposition that the federal common law is not available where conduct is approved by a federal statute or administrative agency. Brief for Petitioners at 38-39, 42 n.20.

The District Court in *New England Legal Foundation,* however, incorrectly relied upon *Jones Falls Sewage,* where the Fourth Circuit declined to restrict statutorily approved conduct specifically because of the absence of interstate ef-

[22] *Accord, Byram River v. Village of Port Chester,* 7 E.R.C. 1127, 1128 (D. Conn. 1974), 394 F. Supp. 618, 622 (S.D. N.Y. 1975); *see also, Michie v. Great Lakes Steel Division,* 495 F. 2d 213, 216 n.2 (6th Cir. 1974), *cert. denied,* 419 U.S. 997 (1974), suggesting that federal common law may be available to private parties where interstate effects are alleged, although to that point only states had pursued such actions.

fects. The Court of Appeals there recognized the *federalist* interest inherent in *interstate* pollution disputes, 539 F. 2d at 1009, but held that the only *federal* interest implicated in an *intrastate* controversy was expressed in and fully circumscribed by the federal statute.

> *To the extent there is a federal interest, it is expressed in the Federal Water Pollution Control Act Amendments of 1972,* but the plaintiffs have no claim based upon the statute. . . .
>
> While the state courts are free to apply state nuisance law more rigidly, a federal court *in such a local controversy* may not turn to a supposed body of federal common law to impose stricter standards than the statute provides. 539 F. 2d at 1009 (footnote omitted; emphasis added).

The court's interpretation of § 505(e) of the Act as preserving only state common law claims appears misplaced. (See argument at Section II B, *supra.*) In any event, the proper reading of the Fourth Circuit's decision would recognize statutory limits only in the absence of allegations of interstate effect.

The better rule would seem to be that applied by the Seventh Circuit in the *Outboard Marine Corp.* case:

> We conclude, based on *Illinois v. Milwaukee* and the Federal Water Pollution Control Act, that there is an overriding federal interest in preserving, free of pollution, our interstate and navigable waters. When a pollution controversy arises, it is immaterial whether there is a showing of extraterritorial pollution effects. The issue is whether the dispute is a matter of federal concern. When it is, as in this case, federal courts should be accessible. The effect of the federal common law of nuisance is to fill the statutory interstices and to provide uniformity in controlling water pollution in either interstate or navigable waters of the United States. 14 E.R.C. at 1287.

Conclusion.

The exercise, or non-exercise, of control over air and water emissions implicates a host of values—land use and planning, municipal finance, industrial development, protection of the public health, and the preservation of ecological rights—traditionally within the ambit of state and local government. When the determination of those values by one state may conflict with that of another, the maintenance of the federal relationship requires that the federal judiciary fashion an equitable resolution from the federal common law. And as environmental protection has itself recently come to be recognized as an interest within the delegated grant of powers to the central government, it has created an independent source of federal equity jurisdiction to effectuate the policies found in various federal environmental legislation, including the Federal Water Pollution Control Act.

The case at bar inspires both sources of federal jurisdiction, by its simultaneous provocation of matters of federal relationship and of federal concern. The Federal Water Pollution Control Act represents a plainly and purposely limited expression of federal policy intended to supplement, rather than to subvert, both the state and federal interests which here justify the application of the federal common law. The decision of the Court below should be affirmed.

Respectfully submitted,

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OCTOBER TERM, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OCTOBER TERM, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

Statement of Interest

In certain circumstances a federal common law public nuisance action may be the only path open to a state government which seeks to resolve an urgent interstate conflict. For this reason, we have chosen to offer a hypothetical fact situation which we believe forcefully illustrates the extent of our interest in this case. The fact situation outlined below incorporates elements of typical cases which the New York State Attorney General faces daily, and which constitute a compelling interest in the issues to be decided in this case.

Suppose that a corporation operates a toxic waste disposal site on the border of an adjacent state near a navigable waterway. The wastes being treated at the site are compounds which include many chemicals. Research conducted by a federal government has documented serious health hazards posed by many of these chemicals. Some of these are not regulated by the United States Environmental Protection Agency (EPA), though many are scheduled to be controlled eventually. The use of some of the chemicals not regulated by EPA is controlled by the U.S. Occupational Safety and Health Administration and the Food and Drug Administration.

The company's existing disposal methods do not meet federal or New York standards, nor do they measure up to industry endorsed practices for the chemicals which EPA does not regulate. The company does meet the adjacent state's less stringent standards. Toxic materials from the company site have been traced to the drinking water of several New York towns and to fish in the adjacent waterways. The company is a viable profit-making venture.

On the facts as stated, New York would have a clear and legitimate interest in attempting to convince this company to establish greater control over its effluents. Equally clearly, failing informal resolution of the problem, New York's interest would have to find expression either in a federal administrative action, or in an action in federal court. New York submits that both routes, rather than merely the former, must remain fully available.

Summary of Argument

The federal common law of public nuisance is part of the underlying legal context on which the Federal Water Pollution Control Act was superimposed. 33 U.S.C. § 1251 *et seq.* (FWPCA, Clean Water Act or Act) Implementation of the FWPCA is intended to be a national reform

project which will compliment and supplement the common law, not supplant it. The Act explicitly preserves all common law actions and provides no basis for excepting federal common law nuisance claims from this provision. Congress intended that the courts continue to develop the common law.

The FWPCA directs EPA to set minimum standards and encourages the states to set stricter standards. The Act also requires EPA to gradually tighten pollution control requirements until no pollutants are discharged. Petitioners describe water pollution problems and the regulatory scheme in an extremely general and theoretical fashion. They conclude from this superficial description that the regulatory tools are sufficient, but that they would be destroyed by any parallel exertions on the part of the federal courts. This view is facile and shortsighted. As a practical matter, the federal common law of public nuisance and the FWPCA do not conflict with or undermine one another. In the past, federal courts and agencies have worked together to achieve the goals of the FWPCA. Congress intended that this partnership continue and grow.

In addition, a state suffering an injury from an out-of-state source has a constitutional guarantee of a federal forum to seek an appropriate remedy. The states have not delegated to the federal government, but have retained, the *parens patriae* responsibility to protect the health and welfare of their citizens. As a matter of law, the FWPCA cannot foreclose an action by a state executive to pursue a remedy in federal court for an interstate nuisance.

The Court should decisively reject the proposition that the FWPCA "tolerates a certain risk of harm" to humans and that the common law remedies interfere with the "efficient operation of the regulatory scheme" and "upset the reasonable expectations" of enterprises which discharge pollutants. Mid-American Legal Foundation Brief, p. 9. The Attorney General of the State of New

York submits that we have not arrived at such an Orwellian state of affairs that the citizens' ancient remedies have been abandoned in favor of abject dependence on the federal bureaucracy. Congress never intended that the FWPCA supplant common law remedies designed to protect health and property, but instead that it would augment them. Congress has instituted a national cleanup campaign, which will eventually tolerate *no* risk of harm from water pollution. In the meantime, it has left individual remedies intact.

I The Language of the Act Makes It Clear That the Statute and the Common Law are Complimentary and the Common Law Is Not Restricted

The FWPCA expresses a clear intention that federal courts continue to develop and apply the federal common law in water contamination cases. It would be surprising indeed if Congress had purported to abolish the federal common law of nuisance. The currents of American law have swelled increasingly with statutory laws, but this proliferation has in no way reduced the significance of the common law, which remains an important and fundamental part of our legal system. The federal common law of nuisance is far from an anomaly or vestige in the statutory context. Rather, it is a basic and vital part of the framework into which the FWPCA was written.*

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* The term "pre-emption" most appropriately describes the action of federal law occupying a particular subject matter area and foreclosing state law in that field. Congress has not pre-empted state law with respect to water quality regulations and this is not a pre-emption case. 33 U.S.C. § 1370.

Wisconsin argues that considerations of comity should influence the federal courts to refrain from applying federal common law in water contamination cases, because the legislature has enacted a statute in this subject area. Wisconsin Brief, p. 22 *et seq.* Such judicial deference might be appropriate if the two sources of law did indeed clash and if Congress had expressed an intention to foreclose common law actions in federal court. Neither of these conditions exists here.

In contrast to the common law's conservative, case-by-case approach, the FWPCA is a project-oriented statute, which attempts to effect a sweeping national reform as expeditiously as possible. Congress designed the FWPCA as a two-part enterprise: first, a massive clean-up and, thereafter, a regulatory scheme enabling the maintenance of these improved conditions. The statute relies in large part on general rules and standards to accomplish these objectives. *E.I. du Pont de Nemours & Co.* v. *Train,* 430 U.S. 112, 116 (1977). However, these are not the exclusive means to be used.

Congress recognized that there would be variations from the average and situations which could not be foreseen when the statute was written. Moreover, when an agency is delegated to implement a statute, there will always be regulatory lag before the agency can reach problems which do not seriously affect the majority of citizens, even though they may very critically affect a minority.* In these situations, the FWPCA provides that affected groups retain recourse to the courts to litigate any common law claims they may have.

The FWPCA's savings clause, Section 505(e), evinces a clear intention not to foreclose any cause of action which presently exists:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any

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* For example, EPA's program for regulating toxic discharges, pursuant to 33 U.S.C. § 1317, consists of a schedule which attempts to study and address the national problem industry by industry and toxic by toxic. This means that the largest industries discharging the greatest quantity of the most hazardous substances will be regulated first—a logical approach for an agency with limited resources and national responsibilities. *Natural Resources Defense Council* v. *Train,* 8 E.R.C. 2120 (D.D.C. 1976). 10 *Natural Resources Lawyer* 507. It means, however, that small local industries may not be reached by EPA for many years, even though they may be operating negligently and damaging the health and ecology of many of their neighbors.

> statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . . 33 U.S.C. § 1365(e)

The Senate Report, which is the acknowledged source of the section 505 savings provisions, states:

> . . . It should be noted, however, that the section would specifically preserve any right or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under the Act would not be a defense to a common law action for pollution damages.*

The court below correctly explained the logic of including the federal common law of nuisance in the savings provision:

> . . . There is nothing in the phrase "any statute or common law" that suggests that this provision is limited to state common law. There is no reason to believe that Congress would have wished to preserve state common law claims and preclude federal common law claims. The preservation of all existing remedies is consistent with the recognition in this Act of the value of public participation in all aspects of the effort "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," exemplified by the direction to EPA and states participating in the national discharge permit system to encourage such participation. (Citation omitted)
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> *People of the State of Illinois* v. *City of Milwaukee,* ("Illinois v. Milwaukee") 599 F. 2d 151, 163 (7th Cir. 1979)

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* *Legislative History of the Water Pollution Control Act Amendments of 1972,* prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress, January 1973, Vol. 2, p. 1499.

The court's holding was clearly correct, as there is no basis for distinguishing the federal common law from the state common law in this context.

Petitioners argue erroneously that subsection 402(4) exempts permit holders from common law actions otherwise allowed by § 505. Petitioners brief, p. 40. In fact, § 402(k) states:

> Compliance with a permit issued pursuant to this section *shall be deemed compliance,* for purposes of section 309 and 505, *with sections 301, 302, 306, 307, and 403,* except any standard imposed under section 307 for a toxic pollutant injurious to human health . . . .
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> 33 U.S.C. § 1342(k) (Emphasis added)

Thus, it is apparent that compliance with a permit does not constitute compliance with all of § 505, but merely with sections 301, 302, 306, 307 and 403. Petitioners' reading of 402(k) would result in the nullification of § 505(e), which was obviously not intended.*

The rule is well established that statutory repeals of the common law by implication are not favored. A statute is not to be construed as taking away a common law right unless that result is absolutely required, as when continuance of the right would render a statutory provision entirely ineffectual. *Isbrandtsen Co.* v. *Johnson,* 343 U.S. 779, 783 (1952); *Jamison* v. *Encarnacion,* 280 U.S. 635, 640 (1930); *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.,*

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* In another context in the FWPCA, Congress specifically provided that § 404 dredge and fill permits would be conclusive as to the effect of the permitted activity on water quality, for purposes of the Act of March 3, 1899. 33 U.S.C. § 1371. This exemption demonstrates that Congress did provide for specific legal effects of permits where it wished to do so.

It is also worth noting that § 402(k) provides that these permits shall not be final, even for their own duration, for purposes of allowing continued discharge of toxic pollutants injurious to human health. 33 U.S.C. § 1342(k).

204 U.S. 426, 437 (1907); *Sierra Pacific Power Co.* v. *Federal Power Commission*, 223 F. 2d 605 (D.C. Cir. 1955), aff'd 350 U.S. 348 (1956). In the present case, where Congress has explicitly preserved the common law, there is simply no basis for interpreting a repeal.*

Consistent with normal legislative practice, Congress clearly meant to do here only what it consciously and specifically did in writing the Act. Moreover, Congress did not revise, delete or modify the savings clause when it revised the Act in 1977. Obviously, Congress was un-

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* Most of those lower federal courts which have dealt with this matter have held that FWPCA does not foreclose common law nuisance actions or at least that the federal district courts have jurisdiction to address the question. As the district court expressed in its holding in *United States ex rel. Scott* v. *United States Steel Corp.*, "... [w]e do not find any provision in [the FWPCA Amendments of 1972] which proposes to abolish the Federal common law of nuisance but rather an intention to supplement and amplify any preexisting remedies. ... (Citations omitted.)" 356 F. Supp. 556, 559 (N.D. Ill. 1973)

Petitioners cite two cases in support of their argument that the federal courts have no power to apply common law in interstate water pollution cases, but these do not stand for that proposition. *Committee for the Consideration of the Jones Falls Sewage System* v. *Train*, 539 F. 2d 1006 (4th Cir. 1976), concerned intrastate pollution and the court held that the plaintiffs must therefore bring their common law claims in state court. 539 F. 2d at 1007, 1010. In *New England Legal Foundation* v. *Costle*, 475 F. Supp. 425 (D.C. Conn.) —— F. 2d —— (2nd Cir. 1980) (decision reserved pending the decision of the Court in the instant case), the district court did not find that the common law had been preempted, but exercised its equitable discretion in the light of the facts in that particular case, not to devise a remedy, finding instead that the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, provided an entirely adequate remedy at law. 475 F. Supp. at 441.

Petitioners' also cite *Arizona* v. *California*, 373 U.S. 546 (1963), for the proposition that once Congress has enacted legislation on the subject of interstate waters, this law is automatically to be applied in the place of previously applicable common law. In that case Congress developed a formula for apportioning the limited waters of the Colorado River among several states and directed the federal agency to implement it. The FWPCA is an entirely different sort of law: it recognizes and actively encourages development of many different approaches to ending water polluation.

willing to make sweeping changes which would abolish any common law right of action.* This Court should give effect to the Congressional purpose, as the court did below.

II The Federal Common Law of Nuisance Does Not Conflict With the Regulatory Scheme

The FWPCA established a regulatory process in which evolution and variety of standards are required. The federal courts are equipped to develop common law remedies in this context without interfering with EPA's operations.

It is surely significant that EPA has not only *not* disapproved the remedy in this case, but has expressed active support of it, through the participation of the United States as *amicus* in support of Illinois. Indeed, EPA itself has pressed federal common law nuisance claims. *United States* v. *Outboard Marine Corp.*, 12 ERC 1348 (N.D. Ill. 1978); *United States* v. *Hooker Chemicals & Plastics Corp., et al.*, Civil Actions Nos. 79-987, 79-988, 79-989 and 79-990 (W.D.N.Y.) EPA is clearly not concerned that its ability to function will be interfered with by such actions. Instead, it sees the common law as an additional tool, to be used when and as appropriate—a sensible and practical view.

A. The Act Provides For Evolution And Variety Of Water Pollution Controls

Petitioners claim that the FWPCA established a uniform, final and exclusive scheme by which pollutant dis-

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* Limiting the common law nuisance cause of action might well lead to ramifications outside of the area of water pollution or even of nuisance law. Moreover, even if Congress had intended to limit the common law of nuisance, its power to do so would be limited. Prof. Prosser states that in general, American legislatures have ". . . power to authorize minor interferences with the convenience of property owners, but not major ones. . . ." Prof. William J. Prosser, *Law of Torts*, West Publishing Co., 1964, p. 628.

chargers could plan their activities. Petitioners' Brief, pp. 3, 18, 27. This construction of the Act is erroneous and illusory. It is obvious from the Act itself and from its legislative history, as clearly set forth in the opinion of the Court of Appeals, that its aim is simply to achieve clean water as soon as possible. It does not purport to give pollutors any abstract rights. In particular, the Act promises neither absolute uniformity nor finality on the broad sense suggested by petitioners. Permits are not granted as general defenses to any claim to imposition of stricter standards.*

The regulatory scheme establishes uniform minimum standards and encourages stricter variations. Petitioners misinterpret the intent of the Act and its legislative history on this point. The law and legislative history set out in petitioners' brief, pp. 28-32, explicitly supports this interpretation of the law, and not the theoretical "uniformity for uniformity's sake" which petitioners would have us believe insulates them from any obligation to reduce polluting effluents. See, e.g., *Natural Resources Defense Council* v. *Costle,* 568 F. 2d 1369, 1378 (D.C. Cir. 1977) and *Natural Resources Defense Council* v. *Train,* 510 F. 2d 692, 711 (D.C. Cir. 1975).

Authority to promulgate uniform standards was delegated to EPA in order to insure that the parochial interests which might dominate some states could not lead

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* Permits and licenses are by their nature limited: "Wherever possible the authority given will be construed to permit only reasonable conduct of the enterprise in a reasonable manner, with proper care and due regard for the interests of others. . . ." Prosser, *op. cit.* at p. 628. Also see *Phalen* v. *Virginia,* 49 U.S. (8 How.) 163, 167-68 (1850). In addition, any exemption afforded by a license extends only so far as the express or necessarily implied grant contained in the license. A license may not be pleaded as a general defense. It must be apparent that the legislature contemplated the doing of the very act which occasions the injury which is claimed to be a nuisance. *Richards* v. *Washington Terminal Co.,* 233 U.S. 546, 552; (1914).

to less stringent standards which could undercut the pollution control efforts of their neighbors. EPA has therefore set national *minimum* standards. Those states which wish to go beyond the minimum are encouraged to do so by the FWPCA.* 33 U.S.C. § 1370.

The Act directs EPA to "average" the pollution problem, in order to address it from a national perspective, and to incorporate general health and other scientific judgments into standards. 33 U.S.C. § 1314. Such standards are necessarily based on an average of the water problems across the country. However, this use of averaging does not mandate overall uniformity in EPA's rules. The averaging is not the end of the FWPCA; it is simply a tool.

Wisconsin concedes that the stricter standards set by states pursuant to the FWPCA are "a logical part" of the "uniform" statutory scheme "because they promote more vigorous anti-pollution efforts where circumstances warrant." Wisconsin Brief, p. 10. Surely this is the same goal sought by a federal court when applying the common law, which is a result clearly contemplated by § 505(e) of the Act. Congress clearly contemplated the use of a wide variety of approaches to water pollution problems.

Petitioners also argue that the FWPCA National Pollution Discharge Elimination System (NPDES) is intended to provide polluters with certainty concerning future pollution control requirements.** 33 U.S.C. § 1342. The

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* Indeed, the FWPCA actively encourages individual approaches to water quality control. The Act designates the Great Lakes and several other water bodies as in need of special attention. 33 U.S.C. § 1254(e) and (f), 1257, 1258, 1263; also § 1314. The states are encouraged to go beyond EPA rules. 33 U.S.C. § 1370. In addition, many of the statutory provisions providing for the issuance of research grants are designed to encourage innovation on individual projects. 33 U.S.C. §§ 1254(h), (g), 1255.

** Petitioners' Brief, p. 32, *et seq.;* also, Illinois State Chamber of Commerce, p. 20, *et seq.;* and National League of Cities and U.S. Conference of Mayors Brief, p. 8.

NPDES permit system is not static. Congress created a dynamic scheme which would require polluters to upgrade controls as technology improved. 33 U.S.C. § 1370, 1254, 1255, 1256. EPA itself is required to foster evolution of technical standards. 33 U.S.C. §§ 1311(d), 1314(a), (d), and (f). Moreover, the entire first subchapter of the Act promotes research programs. 33 U.S.C. § 1251 *et seq.*

The Act provides only limited finality for permit holders. This Court has recognized that the extent of the insulation provided by the Act in § 402(k), 33 U.S.C. § 1342(k), is limited to ". . . compliance with those sections of the Amendments on which the permit conditions are based." *EPA* v. *State Water Resources Control Board,* 426 U.S. 200, 205 (1976). The permit defines and facilitates enforcement of most but not all of a discharger's obligations under the Amendments:

> . . . The purpose of § 402(k) seems to be to insulate permit holders *from changes in various regulations during the period of a permit* and to relieve them of having to litigate *in an enforcement action* the question whether their permits are sufficiently strict. In short, § 402(k) serves the purpose of giving the permits finality.
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> *E.I. du Pont Nemours & Co.* v. *Train, supra,* 430 U.S. at 138, n. 28. (Emphasis added)

Thus, the assurances granted by permit are limited to actions taken pursuant to the Act itself and to the duration of the individual permit.* The context within which Congress wrote the FWPCA remains highly variable.

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* In addition to common law nuisance claims and to EPA actions which will implement improvements in pollution controls, there are other potential sources of change in pollution control requirements. For example, other common law tort actions, such as negligence and wrongful death, may lead to court orders that pollution controls be upgraded. State laws and local ordinances

(footnote continued on following page)

There is no basis for petitioners' argument that they are entitled to uniform standards or to some sort of finality.

B. The Courts Will Apply the Federal Common Law of Nuisance Within the Statutory Framework

There is no reason to expect that the federal courts will apply the common law so as to undermine EPA regulations. In the instant case, the district court set standards which went beyond the EPA standards, but the Act intended that some pollution sources would be subject to stricter standards than EPA established for the majority. 33 U.S.C. § 1370. The court of appeals also looked to the statute for guidance and accordingly modified the district court's remedy in light of the statute and EPA regulations.*

(footnote continued from preceding page)

may also be changed to require stricter controls, a process for which Congress has provided. 33 U.S.C. § 1370. Moreover, in a mandamus action, local, state or federal standards might be overturned on the ground that essential health considerations, perhaps newly discovered, must be taken into account in setting such standards. The future adequacy of pollution control expenditures may be affected by numerous sources of law, none of which were abolished by the FWPCA.

* In addition, contrary to petitioners' suggestion, the Court of Appeals took into account the cost/benefit analysis presented to the district court. 599 F. 2d at 173. Petitioners argue that Congress concluded that the federal courts are not equipped to make decisions regarding water pollution control. Petitioners' brief, p. 30. This is clearly not the case as Congress has provided that these courts should apply the common law and review the agency's decisions. 33 U.S.C. § 1365. Tort actions are often complex and involve technical questions, yet the federal courts regularly address them. There is no reason to distinguish a nuisance action relating to water contamination from other tort cases. Moreover, the federal courts have at their disposal Federal Rule of Civil Procedure 53, which provides for the appointment of special masters. This tool allows a court to pick a competent and highly trained expert in the field to hear testimony, make findings of fact and advise the court in those areas in which it might otherwise be unfamiliar.

The Seventh Circuit opinion addressed the distinction between established common law actions and statutory enforcement actions and it discussed the concept of "common law of the statute." The latter phrase refers to the court's role in making case law which specifically fills in interstices in a statute. This case law is developed pursuant to the principles and goals of the relevant statute. *Illinois* v. *Milwaukee,* 599 F. 2d at 163-64. In the instant case, the court below drew upon the FWPCA, as well as the common law of nuisance, to address the unique facts of this case. The Seventh Circuit's opinion is a particularly appropriate judicial use of the two sources of law.

While Congress clearly intended EPA to be the primary vehicle for implementing the national water quality cleanup, there is no basis whatsoever for arguing that Congress intended to preclude the federal courts from exercising their own skills in situations which call for other or additional remedies than those available to EPA.

Petitioner also makes much of the economic difficulties which municipalities face in bringing their sewage disposal practices into conformance with federal law. Petitioners' Brief, pp. 42 *et seq.* Even assuming that such difficulties confront many municipalities, these financial burdens certainly vary widely in amount, nature and duration. There is no reason to allow all municipalities to shield themselves with the financial weakness of a few. Moreover, an individual defendant's financial ability to abate a nuisance would be a proper issue for a court in a tort action.*

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* This principle is particularly important where a polluter has failed to operate in as clean a manner as is reasonably practicable. Pollution may be caused by a private industrial concern and may take its toll in health or economic costs, which should not be left to be borne by neighboring citizens.

Professor Prosser discusses the kinds of balancing judgments which are appropriate in a nuisance case. ". . . There is no liability for nuisance unless the defendant's conduct is unreasonable

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III. The Constitution Guarantees State Governments a Federal Forum In Which To Seek a Remedy for An Interstate Nuisance.

Article III of the United States Constitution provides the states with recourse to the federal courts for redress of injuries caused by out-of-state sources.* This forum is an essential underpinning of the federal system. The Union rests on the ability of the system to accommodate differences and maintain harmony.

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under the circumstances." Prosser, *op. cit.*, at 602. The fact that nuisance claims are measured in part by negligence standards is an important facet of the common law of nuisance. Prosser, *op cit.*, p. 598. A permit does not give its holder the right to unnecessarily interfere with the rights of others. Negligent conduct thus may cause an actionable nuisance, in spite of any permit or license. The FWPCA sets a minimum level of pollution control. It does not provide a general license to negligently pollute without regard to harm to others.

* The Court has discussed its discretion not to exercise its original jurisdiction in all cases. *Ohio* v. *Wyandotte Chemicals Cargo*, 401 U.S. 493 (1971); *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972). In *Ohio* v. *Wyandotte*, the Court explained that it would decline to accept a case brought by a state only when it could ". . . say with assurance that . . . declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant. . . ." 401 U.S. at 499. In that case, because no federal question was raised by the bill of complaint, the petitioner was left to pursue its remedies in its own court system, even though the respondents were located in Canada and a neighboring state. See 1972 *Wisconsin Law Review* 597, 607-8.

In *Illinois* v. *Milwaukee*, one year later, the Court decided that the federal common law of public nuisance is included in the phrase "laws of the United States", in 28 U.S.C. § 1331(a), which establishes the original jurisdiction of the federal district courts. The motion for leave to file a bill of complaint was therefore denied without prejudice to bringing the action in the district court. This decision better serves the principles underlying Article III than does *Wyandotte*. This is because the federal district court has jurisdiction over all the parties within the United States and has no reason to discriminate in favor of one locality over another. *Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265, 289 (1888).

In *Missouri* v. *Illinois,* 200 U.S. 496 (1906), the Court held that a federal common law of nuisance must exist to redress an affront to a state's physicial integrity, such as water pollution, which is caused by a party in a neighboring state. Writing for the Court, Justice Holmes reasoned that a sovereign which was not a member of the Union might go to war with a neighbor to end such a nuisance. The states, in forming the Union, relinquished this prerogative in exchange for a federal judicial forum. 200 U.S. at 520-21 (1905).*

The Court has many times enumerated the constitutional limits which circumscribe the exercise of Congressional power to regulate interstate commerce, the authority underlying the FWPCA. *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), is particularly relevant here. In that case, the Court held that to the extent that the Fair Labor Standards Act Amendments of 1974 operated to directly displace the states' freedom to function in traditional

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* In a later air pollution case, Justice Holmes described a suit by state for an injury to it as brought in its capacity as *quasi*-sovereign:

> . . . In that capacity the State has an interest independent of and behind the titles of its citizens in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of its forests and its inhabitants shall breathe pure air. . . .
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> . . . When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court.

Missouri v. *Illinois,* 180 U.S. 208, 241.
Georgia v. *Tennessee Copper Co.,* 206 U.S. 230, 237 (1907).

Accord, *Kansas* v. *Colorado,* 206 U.S. 46, 98 (1907); *New York* v. *New Jersey,* 256 U.S. 296, 301-2 (1921); *Nebraska* v. *Wyoming,* 325, U.S. 589 (1945); *State of Texas* v. *Pankey,* 441 F. 2d 236 (10th Cir. 1971).

governmental roles, the statute was invalid as not within the authority to regulate interstate commerce. 402 U.S. at 852, 858.

The controversy in *National League of Cities* v. *Usery,* concerned the breadth of the Congressional power to regulate the state's participation in interstate commerce as employers.* The present case presents a clearer issue. The state function at issue here lies at the very heart of governmental function. When a state acts as *parens patriae* to abate an injury to its physicial integrity, it is not engaging in commerce. Rather, it is functioning as a sovereign, which not only may, but *must,* act to protect the health and welfare of its citizens.

The states have retained both the authority and the responsibility, as *parens patriae,* to use the police power when necessary to protect the health and welfare of citizens. *Hawaii* v. *Standard Oil Co.,* 405 U.S. 251, 257 (1972); *State of West Virginia* v. *Chas. Prizer & Co.,* 440 F. 2d 1079 (2nd Cir.), *cert.* denied *sub nom. Colter Drugs Inc.* v. *Chas. Pfizer & Co.,* 404 U.S. 871 (1971); *Cities Service Oil Co.* v. *Roberts,* 62 F. 2d 579 (10th Cir. 1933); *Board of Supervisors of Fairfax County, Virginia* v. *U.S.,* 408 F. Supp. 556, 566 (E.D. Va. 1976). In the latter case the district court explained the meaning of the phrase *parens patriae:*

> The term literally means 'parent of the country' and traditionally refers to the role of the state as sovereign and guardian of persons under its protection. [Citations omitted] Thus, the concept of *parens*

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* The case prompted a concurring opinion and two dissents. Concurring, Mr. Justice Blackmun read the majority opinion not to ". . . outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and state facility compliance with imposed federal standards would be essential. . . ." 426 U.S. at 856. New York agrees with this statement and notes that, in the present case, Illinois is not resisting compliance with federal standards, but is seeking to supplement them, as Congress has encouraged it to do. 33 U.S.C. § 1370.

> *patriae* is closely linked to that of sovereignty and has been most frequently applied when a state seeks to prevent or repair harm to its quasi-sovereign interests. *Hawaii* v. *Standard Oil Co.*, 405 U.S. at 258, 925 Ct. 885 (1972) and cases cited therein.
> 408 F. Supp. at 566.

While the states primarily attend to problems wholly within their borders, interstate conflicts do occasionally arise in which the health and property of one state's citizens are endangered by activities conducted in a neighboring state. As the Seventh Circuit stated below:

> . . . We can think of no other reason for Congress preserving previously existing rights and remedies than to protect the interests of those who would be able to show that the requirements imposed pursuant to the federal statute are inadequate to protect their interests. When the complaining party is a neighboring state, the federal common law of nuisance provides a peculiarly appropriate remedy.
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> *Illinois* v. *Milwaukee, supra,* 599 F. 2d at 165.

The state government is the sovereign that is charged with the *parens patriae* responsibility. If the Court were to hold that the federal common law of public nuisance has been restricted by the FWPCA Amendments, it would leave state governments at the mercy of the EPA's limited power and discretion to remedy environmental health problems. Moreover, such a holding would also result in a violation of the states' Constitutional right to seek redress of significant injuries in a federal forum, which in certain circumstances is an essential precondition to a state's exercise of its *parens patriae* responsibilities.

The right of states to local self-government is protected by the Constittuion. Each state and region exists in an idiosyncratic ecology, with particular geographic resources upon which its survival depends. Also, each local economy is different from the next and interacts differently with its physical and social environment. The Court has

recognized this practical reality in an analogous context. In *Washington* v. *General Motors Corp.*, 406 U.S. 109 (1972), addressing an air pollution problem, the Court noted that ". . . geophysical characteristics which define local and regional airsheds are often significant considerations in determining the steps necessary to abate air pollution. . . ." The Court held:

> As a matter of law as well as practical necessity corrective remedies for air pollution, therefore, necessarily must be considered in the context of localized situations. (Footnote omitted) . . .
> 406 U.S. at 115-16.

Each state has a unique environmental setting and is responsible to its citizens for preserving it. The initiative of the state government in addressing local health and environmental problems is an essential governmental function which must be respected. Chief Justice Chase declared, in *Texas* v. *White*:

> . . . [i]t may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.
>
> 74 U.S. (7 Wall.) 700, 729 (1868).

In a case which concerned a closely related question, the Second Circuit Court of Appeals upheld water pollution control measures which were stricter than EPA standards and said:

> By the contemplation of minimum federal standards . . . Congress did not intend to relegate the States to the status of enforcement agents for the executive branch of the federal government. To the contrary, it is indisputable that Congress specifically declined to

> attempt a pre-emption of the field in the area of water pollution legislation, and as much as invited the States to enact requirements more stringent than the federal standards. (Citations omitted)
>
> *Mianus River Preservation Committee* v. *EPA*, 541 F. 2d 899, 906 (2nd Cir. 1976).

The Court in that case found that Congress had explicitly encouraged states to legislate independently of EPA.

The Attorney General for the State of New York submits that Congress intended that state executives be independent in their pursuit of improved water quality. Both the Constitution and the FWPCA require that the states retain the option of going to federal court to seek a remedy for an injury which EPA has not addressed or has addressed inadequately.

Conclusion

WHEREFORE, the Attorney General for the State of New York respectfully submits that the Corrt should affirm the decision of the court below.

Dated: New York, New York

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In the Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF MILWAUKEE, ET AL., PETITIONERS

v.

PEOPLE OF THE STATE OF ILLINOIS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

The United States will discuss the following question:

Whether the Clean Water Act, 33 U.S.C. 1251 *et seq.*, preempts the federal common law of nuisance regarding the pollution of interstate and navigable waters.

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INTEREST OF THE UNITED STATES

This case presents important questions concerning the interaction of the Clean Water Act, 33 U.S.C. 1251 *et seq.*,[1] and the federal common law of nuisance as applied to the pollution of interstate and navigable waters. See *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972). The federal government and its agencies are primarily responsible for the administration, interpretation, and enforcement of the Clean Water Act and various other legislation concerning the environment.[2] Pursuant to the Clean Water Act, the Environmental Protection Agency sets technology-based effluent limitations for both private dischargers and publicly-owned waste treatment works, and it finances a substantial percentage of the cost of constructing public sewage treatment facilities. See 33 U.S.C. (and Supp. II) 1281-1297, 1311-1314. The Administrator of EPA also has specific responsibilities with regard to interstate water pollution in general and the Great Lakes in particular. See 33 U.S.C. 1253, 1254(f), 1258.

Consistent with its overriding responsibility for the environment (*Sanitary District* v. *United States*, 266 U.S. 405, 425-426 (1925)), the United States itself has repeatedly relied upon the federal common law of nuisance in addition to various statutory remedies as part of its efforts

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[1] The Clean Water Act refers to the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566. See also Act of Dec. 28, 1973, Pub. L. No. 93-207, 87 Stat. 906; Act of Nov. 2, 1978, Pub. L. No. 95-576, 92 Stat. 2467.

[2] Many of these statutes contain savings clauses essentially identical to Section 505(e) of the Clean Water Act, 33 U.S.C. 1365(e), which is at issue in this case. See, *e.g.*, Section 304(e) of the Clean Air Act, 42 U.S.C. (Supp. II) 7604(e); Section 16(e) of the Deepwater Port Act of 1974, 33 U.S.C. 1515(e); Section 105(g)(5) of the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1415(g)(5); Section 12(e) of the Noise Control Act of 1972, 42 U.S.C. 4911(e); Section 7002(f) of the Solid Waste Disposal Act, 42 U.S.C. 6972(f); Section 1449(e) of the Safe Drinking Water Act, 42 U.S.C. (Supp. II) 300j-8(e); Section 520(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. II) 1270(e); and Section 20(c)(3) of the Toxic Substances Control Act, 15 U.S.C. 2619(c)(3).

to prevent and remedy the pollution of this country's natural resources. See, *e.g.*, *Illinois* v. *Outboard Marine Corp.*, 619 F.2d 623 (7th Cir. 1980), petition for cert. pending, No. 80-126; *United States* v. *Hooker Chemicals & Plastic Corp.*, No. 79-990 (W.D.N.Y., filed Dec. 20, 1979) (Love Canal litigation). See also *United States* v. *Nevada*, 412 U.S. 534, 538 (1973). Furthermore, given the limited resources of the Environmental Protection Agency and the Department of Justice, achieving the national goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters" (33 U.S.C. 1251(a)) depends in large measure on the continued effectiveness of state and private enforcement actions under appropriate federal statutes, state law, and the federal common law. Accordingly, resolution of the issues posed by this case will have a direct impact on the programmatic and enforcement interests of the United States.

STATEMENT

A. *Introduction and Background.*

1. The basic issue in this case is whether petitioners may be held liable under the federal common law of nuisance for discharging raw and inadequately treated sewage into the interstate and navigable waters of Lake Michigan. The litigation began in 1971, when Illinois sought leave of this Court to file an original complaint against petitioners and others for polluting Lake Michigan to the detriment and danger of the residents of Illinois. See *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972). The Court unanimously denied Illinois' motion. The Court concluded that the action against cities and local sewerage commissions in Wisconsin did not constitute a suit against that State within the purview of 28 U.S.C. 1251(a)(1) and that therefore the Court did not have exclusive, original jurisdiction over the controversy. See 406 U.S. at 93-98. And, because another forum was available, the Court declined the exercise of its permissive jurisdiction under 28 U.S.C. 1251(b)(3). 406 U.S. at 98-101, 108. In reaching that decision, however, the Court expressly held that the

suit would lie in an appropriate district court, as one "aris[ing] under the 'laws' of the United States" within 28 U.S.C. 1331(a). 406 U.S. at 99.[3]

The "law" invoked, the Court explained, was the federal common law, existing within the interstices of the numerous federal environmental protection statutes (*id.* at 101–104),[4] and derived from the well-established " 'interstate common law' " regarding disputes over interstate and navigable waters (*id.* at 105–106, quoting *Kansas* v. *Colorado*, 206 U.S. 46, 98 (1907)).[5] Focusing on the interaction between the federal common law and the relevant congressional enactments, the Court observed that although "various federal environmental protection statutes * * * may provide useful guidelines in fashioning [the federal common law]," federal courts applying the common law are not limited by either the remedies or the substantive protections contained in federal legislation. 406 U.S. at 103 & n.5.[6] The Court further commented (*id.* at 107):

> It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.

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[3] The Court thus expressly rejected the "contrary indication in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 n.3 [(1971)]." 406 U.S. at 102 n.3.

[4] The Court cited, *inter alia*, the Rivers and Harbors Act of 1899, 33 U.S.C. 407, and the Federal Water Pollution Control Act, 33 U.S.C. (1970 ed.) 1151 *et seq.* See pages 4–5, *infra*.

[5] The Court specifically cautioned, however, that "it is not only the character of the parties that requires us to apply federal law." 406 U.S. at 105 n.6. See *National Sea Clammers Ass'n* v. *City of New York*, 616 F.2d 1222, 1233–1235 (3d Cir. 1980), petition for cert. pending, No. 79–1711, 79–1754, 79–1760, and 80–12 (private parties may invoke federal common law).

[6] Likewise, the Court suggested that "[w]hile federal law governs, consideration of state standards may be relevant." 406 U.S. at 107 (footnote omitted).

2. At the time of the Court's decision in *Illinois* v. *City of Milwaukee*, the primary federal statutes concerning the problem of water pollution were the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. (1970 ed.) 1151 *et seq.*, and Section 13 of the Rivers and Harbors Act of 1899 ("the Refuse Act"), 33 U.S.C. 407. See *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 202–203 (1976). Under the FWPCA, ambient water quality standards, establishing permissible levels of pollution in particular bodies of water, constituted the principal pollution control mechanism. See 33 U.S.C. (1970 ed.) 1160(c).[7] The states were primarily responsible for developing these water quality standards and also an implementation plan meeting certain statutory criteria. See 33 U.S.C. (1970 ed.) 1160(c)(1), (c)(3). Where, however, the state either failed to establish a water quality standard or the standard was inadequate, the Administrator of the Environmental Protection Agency was required to promulgate appropriate water quality standards after consulting with various state authorities. See 33 U.S.C. (1970 ed.) 1160(c); *EPA* v. *Water Resources Control Board*, *supra*, 426 U.S. at 202 & n.4.

The original FWPCA also assigned the states the initial responsibility for enforcing water quality standards and abating water pollution. The states were free to establish enforcement procedures regarding intrastate pollution. See *EPA* v. *State Water Resources Control Board*, *supra*, 426 U.S. at 203. Moreover, the appropriate state authority (or, in some cases, the Administrator of the EPA) could initiate an enforcement conference among state, federal, and other interested parties, whenever a discharge into interstate waters either reduced the quality of such waters below the established standard or endangered the health or welfare of any person. See 33 U.S.C. (1970 ed.) 1160(a), (c)(5), and (d). If the conferees could not settle the

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[7]The FWPCA also directed the Administrator of EPA to conduct various research and development projects, including a study of the Great Lakes, and to help finance the construction of publicly owned sewage treatment works. See 33 U.S.C. (1970 ed.) 1155, 1158.

dispute and if the pollution discharges continued to "endanger[] the health or welfare of any person" six months after the discharger received notice of the violation, the United States was then authorized to bring suit to abate the pollution. See 33 U.S.C. (1970 ed.) 1160(a), (c)(5), (g); *Illinois* v. *City of Milwaukee*, *supra*, 406 U.S. at 103.[8]

In order to supplement the inconsistent efforts of the states under the FWPCA, federal officials also established the Refuse Act Permit Program ("RAPP") pursuant to the Refuse Act, 33 U.S.C. 407, which prohibits the discharge of any matter into navigable waters without a federal permit. See *EPA* v. *State Water Resources Control Board*, *supra*, 426 U.S. at 203; *Illinois* v. *City of Milwaukee*, *supra*, 406 U.S. at 102; 36 Fed. Reg. 6564 *et seq.* (1971). Under these regulations, every industrial discharger had to obtain a federal permit. RAPP permits, in turn, required the dischargers to comply with applicable water quality and hazardous waste standards. See 33 C.F.R. 209.131 (1972). RAPP did not, however, govern the discharges of public sewage treatment systems. 33 C.F.R. 209.131(d)(2)(ii) (1972).

3. In 1972, subsequent to the decision in *Illinois* v. *City of Milwaukee*, Congress substantially rewrote the FWPCA. See Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. 1251 *et seq.*; *EPA* v. *State Water Resources Control Board*, *supra*, 426 U.S. at 203–209. These 1972 amendments, now referred to as the Clean Water Act (see note 1, *supra*), declare that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. 1251(a)(1). *Costle* v. *Pacific Legal Foundation*, No. 78-1472 (Mar. 18, 1980), slip op. 2–3. To achieve this goal, Congress expanded the EPA re-

[8] If the discharge was endangering the health or welfare of persons only in the state where the discharge originated, then the federal suit was conditioned upon the written request of that state's governor. 33 U.S.C. (1970 ed.) 1160(g)(2).

search, demonstration, and funding programs contained in the original FWPCA[9] and established a new system of technology-based standards and permits, primarily aimed at achieving effluent limitations on all point sources, as well as achieving acceptable water quality standards. *EPA* v. *State Water Resources Control Board, supra*, 426 U.S. at 204.[10]

Thus, Section 301(b) of the Act, 33 U.S.C. (and Supp. II) 1311(b), directs the Administrator of EPA to set increasingly stringent effluent limitations for various categories of "point sources," including municipal dischargers.[11] See generally *E. I. duPont deNemours & Co.* v. *Train*, 430 U.S. 112 (1977); *National Crushed Stone Association* v. *EPA*, 601 F.2d 111 (4th Cir. 1979), cert. granted, No. 79-770 (Feb. 19, 1980). With regard to publicly owned treatment works, the Act requires application of "secondary treatment as defined by the Administrator"[12] no later than July 1, 1977 (33 U.S.C.

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[9]Title I of the Clean Water Act provides for various research and development programs. See 33 U.S.C. (and Supp. II) 1252-1265. Title II of the Act authorizes a massive construction grants program for municipal treatment facilities. 33 U.S.C. (and Supp. II) 1281-1297. Pursuant to a statutory formula involving relative population and sewage treatment needs, each state is allocated a certain share of federal funds. 33 U.S.C. (and Supp. II) 1285. Depending upon the priorities set by the state, EPA will fund 75% of the cost of each qualifying waste treatment project necessary to meet the requirements of the Act up to the total of the state's allocation. 33 U.S.C. (and Supp. II) 1281-1284, 1296. Certain innovative treatment works are eligible for 85% federal funding. 33 U.S.C. (Supp. II) 1282(a)(2). Projects to correct overflows from both separate sanitary sewer systems and combined storm and sanitary sewer systems are eligible for federal funding.

[10]See 33 U.S.C. (and Supp. II) 1311-1328, 1341-1345, 1364-1365, 1369-1371.

[11]A point source is a discrete outlet from which pollutants may be discharged, including pipes, sewers, and treatment plants. See 33 U.S.C. (Supp. II) 1362(14).

[12]Primary treatment involves screening and sedimentation to remove suspended organic and inorganic solids. Secondary treatment involves use of biological processes, primarily decomposition, with or without chemical disinfectants, to remove organic wastes.

1311(b)(1)(B), 1314(d)(1))[13] and "best practicable waste treatment technology over the life of the works" by July 1, 1983 (33 U.S.C. (and Supp. II) 1311(b)(2)(B), 1281(g)(2)(A)). Pursuant to Section 301(b)(1)(B), 33 U.S.C. 1311(b)(1)(B), the Administrator has issued regulations defining secondary treatment in terms of allowable limits of certain conventional pollutants.[14] No regulations exist, however, regarding the allowable discharge of viral and bacterial pathogens, fecal coliforms, or phosphorous and chlorine residuals. Moreover, because sewers and pipes that do not lead to a treatment facility are not considered publicly owned treatment works for purposes of Section 301 (see 40 C.F.R. 122.3(bb); 45 Fed. Reg. 33423 (1980) (to be codified at 40 C.F.R. 122.3)), overflows from combined storm and sanitary sewers are not subject to the secondary treatment and best practicable waste treatment requirements.[15]

The effluent limitations constitute the minimum level of pollution control under the Act. See 33 U.S.C. 1311(b)(1)(C); 45 Fed. Reg. 33512 (1980) (to be codified at 40 C.F.R. 125.3). Section 303, 33 U.S.C. 1313, of the Act preserved any existing water quality standards issued under the original FWPCA and directs each state to promulgate water quality standards governing all intra-

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[13] On December 27, 1977, Congress amended the Act to permit the Administrator to grant extensions of this deadline through, but no later than, July 1, 1983, where compliance has been delayed by construction problems or lack of federal financial assistance. Clean Water Act of 1977, Pub. L. No. 95-217, Section 45, 91 Stat. 1584, 33 U.S.C. (Supp. II) 1311(i); *Costle* v. *Pacific Legal Foundation*, *supra*, slip op. 4 n.4. The amendments also permit limited modification of the secondary treatment requirements for publicly owned treatment plants that discharge into marine waters. Section 44, 91 Stat. 1584, 33 U.S.C. (Supp. II) 1311(h).

[14] These regulations focus on five-day biochemical oxygen demand, suspended solids, and pH. 40 C.F.R. 133.102.

[15] Such overflows must be covered by a permit and must comply with Sections 301(b)(1)(A) and 301(b)(2). No specific effluent limitation regulation has been issued with regard to combined sewer overflows, which must therefore be considered on a case-by-case basis. 40 C.F.R. 125.3(c)(2). See also 40 C.F.R. 133.103(a).

state waters and to review its water quality standards at least every three years. 33 U.S.C. 1313(a), (c), (d), (e).[16] The states may also impose more stringent effluent limitations or other forms of pollution control as a matter of state law. 33 U.S.C. 1370. Finally, under Section 302 of the Act, the Administrator may require more stringent effluent limitations for particular point sources in order to protect public water supplies, agricultural and industrial uses, shellfish, fish and wildlife, and recreational uses, but only if such additional limitations are cost justified. 33 U.S.C. 1312(a), (b).[17]

Section 402 of the Act, 33 U.S.C. (and Supp. II) 1342, establishes the National Pollutant Discharge Elimination System ("NPDES"), which is designed "to transform generally applicable effluent limitations and other standards—including those based on water quality—into the obligations (including a timetable for compliance) of the individual discharger." *EPA* v. *State Water Resources Control Board, supra,* 426 U.S. at 205.[18] It is unlawful for any person to discharge pollutants into the Nation's waters without an NPDES permit, and such permits incorporate effluent limitations, water quality standards, and other applicable requirements. See *ibid.*; *Crown Simpson Pulp Co.* v. *Costle,* No. 79-797 (Mar. 17, 1980), slip op. 1; *Costle* v. *Pacific Legal Foundation, supra,* slip op. 3; 33

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[16] All proposed water quality standards are subject to EPA review, and EPA may issue applicable water quality regulations whenever a state either fails to promulgate such standards or its proposed standards do not satisfy statutory requirements. 33 U.S.C. 1313(a), (b), and (c).

Illinois water quality standards governing its portion of Lake Michigan are more stringent than the comparable Wisconsin water quality standards (see Pet. App. A-38 to A-39). Compare Ill. Water Pollution Control Board Rules and Regulations ch. 3, 1 Envir. Rep. (BNA) 766:0501 *et seq.* (1979) with Wisc. Admin. Code ch. NR 102, 2 Envir. Rep. (BNA) 951:1001 *et seq. (1978).*

[17] The Administrator has never modified an effluent limitation pursuant to Section 302, 33 U.S C. 1312.

[18] The NPDES program replaced the RAPP system. 33 U.S.C. (Supp. II) 1342(a)(5).

U.S.C. (and Supp. II) 1311, 1342. NPDES permits are issued by the EPA or, in those covered jurisdictions in which EPA has authorized a state agency to administer the NPDES program,[19] by the state agency subject to EPA review. See 33 U.S.C. (and Supp. II) 1342(a)-(d); *Crown Simpson Pulp Co.* v. *Costle, supra,* slip op. 1-2, 4; *E.I. duPont deNemours & Co.* v. *Train, supra,* 430 U.S. at 119-120 & n.7; *EPA* v. *State Water Resources Control Board, supra,* 426 U.S. at 206-208.[20] In accordance with the Act and EPA's regulations, all interested parties, including a state whose waters may be affected by the discharges in question, are entitled to notice and an opportunity for a hearing regarding the issuance of a permit. See *Costle* v. *Pacific Legal Foundation, supra*; 33 U.S.C. 1342(a)(1), (b)(3)-(b)(5), (j); 40 C.F.R. Parts 124-125; 45 Fed. Reg. 33484 *et seq.* (1980).[21]

The Clean Water Act also strengthens the enforcement provisions of the original FWPCA. Section 309(c) imposes criminal penalties for willful or negligent violations of the Act (33 U.S.C. (and Supp. II) 1319(c)), and authorizes the Administrator to bring civil enforcement actions "for appropriate relief, including a permanent or temporary injunction" and for limited civil penalties. 33 U.S.C. (and Supp. II) 1319(a), (b), (d). So-called "permitting states" and adversely affected private persons may also bring enforcement actions, subject to specific statutory conditions. 33 U.S.C. (and Supp. II) 1319(a)(1), 1365. Section 505(e)

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[19] Thirty-two states and covered territories, including Wisconsin, operate their own NPDES program.

[20] EPA decisions issuing or denying permits (or failing to approve state-issued permits) are subject to limited judicial review in the courts of appeals. 33 U.S.C. 1369(b)(1)(F); see *Crown Simpson Pulp Co.* v. *Costle, supra.*

[21] Section 402(b)(5) provides that an affected state may submit written recommendations to the Administrator and the permitting state and that, if the permitting state does not accept such recommendations, it must notify the affected state and the Administrator of its reasons for rejecting the recommendations. 33 U.S.C. 1342(b)(5). Thereafter, the Administrator may refuse to approve the permit. 33 U.S.C. (Supp. II) 1342(d)(2)(A).

provides, however, that the statutory right of action does not "restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief * * *." 33 U.S.C. 1365(e).

B. *The Proceedings Below.*

1. On May 19, 1972, in accordance with this Court's invitation in *Illinois* v. *City of Milwaukee*, *supra*, the State of Illinois filed suit in the United States District Court for the Northern District of Illinois, claiming that petitioners' discharge of massive amounts of untreated and undertreated sewage into Lake Michigan constituted a federal common law nuisance.[22] It was alleged that petitioners' discharges polluted the Illinois portion of Lake Michigan and thereby threatened the health and welfare of Illinois residents and accelerated eutrophication of the lake. Subsequently, the State of Michigan intervened in this suit as a plaintiff solely with regard to the issue of eutrophication (Pet. App. A-2 to A-3).

Prior to trial, petitioners moved to dismiss the complaint on jurisdictional and venue grounds. The district court denied this motion, concluding that service of respondents was proper under the Illinois "long-arm" statute and that venue lay in the Northern District of Illinois under 28 U.S.C. 1391(b). See Pet. App. H. Thereafter, based on the 1972 amendments to the FWPCA (see pages 5-9, *supra*), petitioners again moved to dismiss the complaint, arguing that the new Clean Water Act preempted the federal common law. The district court denied this motion as well (Pet. App. G). The court pointed out (Pet. App. G-5) that Sections 101(b) and 510 of the Act evidence Congress' intent to preserve the "rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. (Supp. II) 1251(b); see 33 U.S.C. 1370. The court further ob-

[22] Respondent also claimed that respondents' pollution violated the Illinois Environmental Protection Act, Ill. Ann. Stat. ch. 111-½, § 1001 *et seq.* (Smith-Hurd 1977), and state common law.

served that where Congress had intended to preempt other law it had done so explicitly (citing 33 U.S.C. 1322(f)(1)) and that "[n]owhere do the 1972 amendments express any intention of eliminating the rights of the states to seek common law nuisance protection" (Pet. App. G-5).

Following a four-month trial, the district court made extensive oral findings about the discharge of raw sewage into Lake Michigan from both petitioners' combined storm and sanitary sewer system and its separate sanitary sewer system, and the discharge of inadequately treated sewage from petitioners' two sewage treatment plants (Pet. App. F).[23] Applying a clear and convincing burden of proof (*id.* at F-2 to F-3, F-14), the court found that petitioners' sewer systems discharge disease-causing bacteria and viruses into Lake Michigan and that as a result of the currents in Lake Michigan, these pathogens reach Illinois waters in substantial numbers as often as 12 times per year or more (*id.* at F-6 to F-11). The court further concluded that these pathogens can infect bathers at Illinois beaches and contaminate the drinking water that is extracted from Lake Michigan (*id.* at F-10 to F-12), and thus "constitute[] a health hazard of serious magnitude to the residents of the State of Illinois" (*id.* at F-15). In addition, the court found that the phosphorous and other nutrients contained in the sewage are accelerating the eutrophication of Lake Michigan (*id.* at F-15 to F-23).

Based on these findings, the court held that petitioners' discharge of raw and improperly treated sewage into Lake Michigan is a nuisance as a matter of federal common law.[24] Accordingly, the district court granted respondents'

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[23] As to the latter, the district court specifically found that petitioners were not complying with EPA regulations and that, in any event, compliance with EPA secondary treatment standards "would still result in the discharge of staggering numbers of pathogens to Lake Michigan" (Pet. App. F-6).

[24] The district court also held petitioners liable under Illinois statutory and common law (Pet. App. F-2). The court of appeals did not address these alternative bases for relief (Pet. App. A-46). These claims are a subject of respondent Illinois' cross-petition. See *People of*

request for injunctive relief. In particular, the court ordered petitioners, pursuant to an agreed timetable, to cease discharging raw sewage into the lake. The order requires petitioners to construct substantial sewage treatment and storage facilities in addition to the facilities that petitioners must in any event build to comply with existing Clean Water Act regulations. Furthermore, the district court's order mandated that petitioners' sewage treatment plants meet certain effluent limitations more stringent than the applicable Clean Water Act standards. See Pet. App. D, F-24 to F-29.

2. On appeal, the court of appeals affirmed in part and reversed in part. The court first rejected petitioners' jurisdictional and venue claims (Pet. App. A-4 to A-6). After carefully examining the evolution of the Clean Water Act (Pet. App. A-6 to A-17), the court also rejected petitioners' claims that the Clean Water Act had preempted the federal common law of nuisance and that, in any event, compliance with Clean Water Act standards constitutes an absolute defense to respondents' common law claims (*id.* at A-17 to A-20). The court explained that Sections 510 and 511 of the Act, 33 U.S.C. 1370–1371, evidence congressional intent to permit "establishment of more stringent limitations" than those imposed by the Act itself, and that Section 505(e), 33 U.S.C. 1365(e), explicitly preserves all common law rights of action (Pet. App. A-17 to A-18).

The court observed, however, that the policies and even the standards of the Clean Water Act should guide a court in applying the federal common law of nuisance (*id.* at A-20 to A-23). In accordance with this principle and based on an exhaustive examination of the trial record, the court of appeals agreed with the district court that petitioners' raw sewage discharges both constitute a hazard to the public health and substantially contribute to eutrophication, and are thus subject to abatement (*id.* at A-26 to

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the State of Illinois v. *City of Milwaukee*, cross-petition for cert. pending, No. 79-571.

A-39, B-2 to B-27). But the court of appeals reversed insofar as the district court had imposed effluent standards on petitioners' treatment plants more stringent than those required under the Clean Water Act (*id.* at A-40 to A-48, B-27 to B-32). See *People of the State of Illinois* v. *City of Milwaukee*, cross-petition for cert. pending, No. 79-571.[25]

SUMMARY OF ARGUMENT

In *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), this Court unanimously concluded that pollution of interstate or navigable waters gives rise to an action under the federal common law of nuisance, which survives and complements the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. (1970 ed.) 1151 *et seq.*, and the other existing federal legislation concerning pollution control. The Court noted, however, "that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." 406 U.S. at 107. The question primarily posed by this case is whether the subsequent amendments to the FWPCA, now commonly referred to as the Clean Water Act, have precluded or limited federal common law actions to abate water pollution. We submit that the court of appeals correctly concluded that nothing in the language, legislative history, or structure of the Clean Water Act suggests that Congress intended to preempt the long-standing federal common law regarding interstate water disputes.

Indeed, the language of the Act unambiguously demonstrates that Congress intended to preserve, not preempt, the federal common law. First, where Congress sought to preempt other laws, it did so expressly. See 33 U.S.C.

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[25] The United States takes no position as to whether the district court's order, as modified by the court of appeals, constitutes a proper remedy under the federal common law of nuisance. EPA and petitioners are currently disputing whether and to what extent federal funds will be available to defray the cost of the sewage treatment works ordered by the courts below. See note 9, *supra*.

1322(f)(1). No such provision governs this case. More important, Section 505(e) provides that a state's rights under the Act do not "restrict any right which [the state] may have under any statute or *common law* to seek enforcement of any effluent standard or limitation or *to seek any other relief* * * *." 33 U.S.C. 1365(e) (emphasis supplied). Similarly, Sections 101(b), 510, and 511 of the Act make clear that, pursuant to any other law, both state and federal authorities may impose and enforce more stringent levels of pollution control than those required by the Clean Water Act. See 33 U.S.C. (and Supp. II) 1251(b), 1370, 1371. Accordingly, the courts have uniformly concluded that the Clean Water Act does not preempt the federal common law of nuisance regarding interstate pollution.

The legislative history of the Act also shows that passage of the Clean Water Act did not affect "the right of persons (or class of persons) to seek enforcement or other relief under any statute or common law * * *." H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 134 (1972). For example, the Senate Report accompanying the Act states (S. Rep. No. 92-414, 92d Cong., 1st Sess. 81 (1971)):

> It should be noted, however, that [Section 505(e)] would specifically preserve any rights or remedies under any other law. * * * Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.

The legislative debates and hearings also reflect Congress' considered view that the Clean Water Act would not affect or hinder any suit arising under the federal common law of nuisance.

Seeking to circumvent the plain meaning and legislative history of the Act, petitioners argue that preservation of the common law will frustrate the congressional design. But Congress itself contemplated that the federal common law would supplement the rights and remedies created by the Clean Water Act. Moreover, the Environmental Protection Agency, which is primarily responsible for administering and enforcing the Act, has long viewed the federal common law as an essential complement to the

Act. EPA's judgment that suits under the federal common law of nuisance will advance rather than impede the policies and goals of the Act is entitled to substantial deference.

In any event, petitioners' claims regarding the conflict between the common law and the Act are unfounded. Petitioners suggest that the imposition of more stringent pollution control requirements under the common law will disrupt the uniform level of effluent limitations set pursuant to Section 301 of the Act, 33 U.S.C. (and Supp. II) 1311. But the Act makes clear that the effluent limitations set by EPA are only a uniform national *minimum* level of pollution control, and that there is no statutory bar to still higher standards of pollution control. See 33 U.S.C. 1311(b)(1)(C), 1370, 1371. Furthermore, the equitable principles that inform the federal common law of nuisance, should ensure that the relief granted by the federal courts will neither be untimely nor disproportionate to the harm caused by a defendant's discharges.

Finally, petitioners erroneously contend that there is no longer a need for the federal common law of nuisance. To the contrary, this case highlights the critical functions that the common law continues to serve. Congress has recognized that the Act and EPA's regulations fail to address adequately the problems of combined sewer overflows—precisely the source of raw sewage at issue here. See 33 U.S.C. (Supp. II) 1375(c) (requiring EPA to submit a report on "the status of combined sewer overflows in municipal treatment works operations"). Likewise, EPA's regulations regarding secondary sewage treatment do not govern the discharge of the pollutants, such as pathogens, fecal coliforms, and phosphorous, that give rise to respondents' suit. And although one state may set strict standards with regard to the permissible level of pollution in its waters, it has no authority under the Act either to compel another state that shares the same waters to adopt or impose equally high standards or to remedy the consequences of past pollution not regulated by the Act. Accordingly, in the absence of a federal common law remedy,

a state may well be powerless to protect the health and safety of its citizens and to preserve the quality of its waters.

ARGUMENT

THE CLEAN WATER ACT NEITHER PREEMPTS NOR MARKS THE OUTER BOUNDS OF THE FEDERAL COMMON LAW OF NUISANCE REGARDING INTERSTATE WATER POLLUTION

A. Introduction: The Federal Common Law Of Nuisance

1. Although "there is no federal general common law" (*Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938)),[26] this Court has long recognized that there is an "interstate common law" regarding disputes over the use, ownership, and pollution of interstate and navigable waters. *Kansas* v. *Colorado*, 206 U.S. 46, 98 (1907). See, *e.g.*, *Missouri* v. *Illinois*, 180 U.S. 208, 241–245 (1901); *Kansas* v. *Colorado*, 185 U.S. 125, 146–147 (1902); *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907); *Sanitary District* v. *United States*, 266 U.S. 405, 425–426 (1925); *Connecticut* v. *Massachusetts*, 282 U.S. 660, 669–671 (1931); *New Jersey* v. *New York*, 283 U.S. 336, 342–343 (1931); *United States* v. *Nevada*, 412 U.S. 534, 538–539 (1973); *Vermont* v. *New York*, 417 U.S. 270, 275 n.5 (1974). Indeed, in *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), which was decided the same day as *Erie R.R.* and which was also written by Mr. Justice Brandeis, the Court expressly confirmed that the apportionment of interstate waters ordinarily involves "a question of 'federal common law.' " And, of course, in *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 99 (1972)—a case arising out of the same controversy now before the Court—, the Court unanimously concluded that "pollution

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[26] See generally Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964).

of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of [28 U.S.C.] 1331(a)."

The decision in *Illinois* v. *City of Milwaukee* was premised on three interrelated considerations. First, the Court surveyed the substantial federal legislation concerning this Nation's waters and concluded that "it is federal, not state, law that in the end controls the pollution of interstate or navigable waters." 406 U.S. at 102. Because of the overriding federal interest reflected in various congressional enactments, the Court concluded that it was appropriate for the federal courts to fashion federal law using the federal environmental protection statutes as guidelines (*id.* at 103 & n.5) and to provide federal remedies even though "not within the precise scope of remedies prescribed by Congress" (*id.* at 103). In short, the field of water pollution "is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176 (1942). See also *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973); *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 393–403 (1970); *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 201–203 (1967); *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 491–492 (1960); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456–457 (1957).

Moreover, the Court recognized (406 U.S. at 104–105) that the federal common law of nuisance has constitutional underpinnings arising out of the federal system. Each state retains a quasi-sovereign interest over its natural resources such as air and water and may act to protect such resources even from pollution emanating from another state. See, *e.g.*, *Georgia* v. *Tennessee Copper Co.*, *supra*, 206 U.S. at 237–238; *Kansas* v. *Colorado*, *supra*, 185 U.S. at 142; *Missouri* v. *Illinois*, *supra*, 180 U.S. at 241. In entering the Union, however, the states surrendered their independent "[d]iplomatic powers and the right to make

war" as means of settling interstate disputes. *Ibid.* See, *e.g.*, *Georgia* v. *Tennessee Copper Co.*, *supra*, 206 U.S. at 237; *Missouri* v. *Illinois*, 200 U.S. 496, 520–521 (1906); U.S. Const. Art. I, Section 10, cls. 1, 3. Nor can the victim state generally enforce its own law beyond its borders. Cf. *Nevada* v. *Hall*, 440 U.S. 410 (1979). Yet, its sovereign rights ought not be circumscribed by the law of its neighbor state, which may be inadequate. Accordingly, federal law must perforce serve as a basis for resolving interstate pollution disputes. See, *e.g.*, U.S. Const. Art. III, Sections 1, 2; *Nebraska* v. *Wyoming*, 325 U.S. 589, 608 (1945); *New Jersey* v. *New York*, *supra*, 283 U.S. at 342–343; *North Dakota* v. *Minnesota*, 263 U.S. 365, 372–374 (1923); *Georgia* v. *Tennessee Copper Co.*, *supra*; *Texas* v. *Pankey*, 441 F.2d 236, 240–242 (10th Cir. 1971); Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 Colum. L. Rev. 1024, 1030–1032 (1967); Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 13–14 & n.72 (1975).[27]

The decision in *Illinois* v. *City of Milwaukee* makes clear, however, that "it is not only the character of the parties that requires us to apply federal law [but also] * * * an overriding federal interest * * * in the pollution of a body of water such as Lake Michigan bounded, as it is, by four States." 406 U.S. at 105 n.6. As Judge Friendly has explained, "the Constitution can well be deemed to require that the federal courts should fashion law when the interstate nature of a controversy makes it inappropriate that the law of either state should govern." Friendly, *In*

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[27] Similarly, a suit by the federal government to abate pollution of interstate or navigable waters of the United States necessarily involves application of federal law. See, *e.g.*, *United States* v. *Nevada*, 412 U.S. 534, 538–539 (1973); *Sanitary District* v. *United States*, 266 U.S. 405, 425–426 (1925); *Illinois* v. *Outboard Marine Corp.*, 619 F.2d 623 (7th Cir. 1980), petition for cert. pending, No. 80–126; *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975); *United States* v. *Atlantic-Richfield Co.*, 478 F. Supp. 1215, 1218–1220 (D. Mont. 1979). See also *Kaiser Aetna* v. *United States*, 444 U.S. 164, 173 (1979).

Praise of Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 408 n.119 (1964). In other words, regardless of the identity of the litigants, resolution of a dispute over interstate or navigable waters requires application of uniform federal law rather than inconsistent state law. See, *e.g.*, *Vermont* v. *New York*, *supra*, 417 U.S. at 275 n.5; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426–427 (1964); *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, *supra*, 304 U.S. at 110–111; Hill, *Constitutional Preemption*, *supra*, 67 Colum. L.Rev. at 1074–1076; Woods and Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the* Wyandotte *Case*, 12 Ariz. L.Rev. 691, 711–714 (1970).

2. Petitioners do not contest the essential conclusion of the Court in *Illinois* v. *City of Milwaukee* that federal common law governs public nuisance actions regarding the pollution of interstate or navigable waters. Without question, petitioners' continuing discharges of raw sewage into Lake Michigan trench upon the quasi-sovereign interests of several states and threaten the quality of an interstate body of water. Moreover, insofar as the federal common law is affected by congressional legislation,[28] the evolution of the FPWCA and Clean Water Act described above (pages 4–10, *supra*) clearly reflects increased federal concern and involvement in "the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). See also, *e.g.*, 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 178, 248, 250–251, 332, 343–348, 355–356, 359, 451–453, 516–517, 664, 716, 737, 1422–1428 (Comm. Print 1973).

Rather, petitioners contend that the Clean Water Act preempts federal common law nuisance actions. To be sure, Congress may abrogate or supplant well-settled common law rights and duties. See, *e.g.*, *Carlson* v. *Green*, No. 78–1261 (Apr. 22, 1980), slip op. 4; *Illinois* v.

[28]The federal courts applied the "interstate common law" of public nuisance long before Congress enacted the original FWPCA in 1948. See, *e.g.*, *Kansas* v. *Colorado*, *supra*, 206 U.S. at 98; *Georgia* v. *Tennessee Copper Co.*, *supra*.

City of Milwaukee, supra 406 U.S. at 107; *Arizona* v. *California*, 373 U.S. 546, 564–566 (1963); *New Jersey* v. *New York, supra*, 283 U.S. at 348. But petitioners do not suggest that the Clean Water Act expressly precludes common law relief. In the absence of such an explicit congressional declaration, this Court has repeatedly concluded that "a common-law right * * * is not to be abrogated 'unless it be found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory." *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298 (1976), quoting *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907). See, *e.g.*, *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952). See also *Carlson* v. *Green, supra*, slip op. 4.[29]

Here, the presumption against abrogation of common law rights has special force because, as in *Nader* v. *Allegheny Airlines, Inc., supra*, 426 U.S. at 299, there is no "irreconcilable conflict between the statutory scheme and the persistence of common law remedies." To the contrary, common law nuisance actions are expressly preserved by the Act (Point B, *infra*) and serve to supplement the statutory scheme, particularly in the area of municipal discharges into interstate waters (Point C, *infra*). Thus, the court of appeals correctly concluded that the Clean Water Act does not preempt the federal common law of nuisance regarding the pollution of interstate waters (Pet. App. A–17 to A–23). Accord, *Illinois* v. *Outboard Marine Corp.*, 619 F.2d 623, 626 n.13 (7th Cir. 1980), petition for cert. pending, No. 80–126; *National Sea Clammers Association* v. *City of New York*, 616 F.2d 1222, 1233 n.31 (3d Cir. 1980), petitions for cert pending, Nos. 79–1711, 79–1754, 79–1760, and 80–12; *California*

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[29] *Carlson* involved the question whether the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, preempts constitutional common law actions. See *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Similarly, respondents' federal common law actions have a constitutional basis. See pages 17–19, *supra*.

Tahoe Regional Planning Agency v. *Jennings*, 594 F.2d 181, 193 (9th Cir.), cert. denied, 444 U.S. 864 (1979); *Committee for Jones Falls Sewage System* v. *Train*, 539 F.2d 1006, 1008–1009 (4th Cir. 1976); *United States* v. *Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110, 119–120 (D. Vt.), aff'd, 487 F.2d 1393 (2d Cir. 1973), cert. denied, 417 U.S. 976 (1974); *United States* v. *Atlantic-Richfield Co.*, 478 F. Supp. 1215, 1218–1220 (D. Mont. 1979).

B. The Clean Water Act Expressly Preserves Independent Federal Common Law Rights And Remedies Regarding The Abatement Of Water Pollution

1. The language of the Clean Water Act makes clear that Congress intended to preserve the federal common law of nuisance. Section 505 of the Act, 33 U.S.C. 1365, authorizes citizen suits, including suits by states, to enforce the terms and requirements of the Act. Section 505(e) unambiguously provides, however, that "[n]othing in this section shall restrict *any right* which *any person* (or class of persons) may have under any statute or *common law* to seek enforcement of any effluent standard or limitation or to seek *any other relief* (including relief against the Administrator or a State agency)." 33 U.S.C. 1365(e) (emphasis supplied). Since the Act specifically defines person to include a "State, municipality, commission, or political subdivision of a State, or any interstate body" (33 U.S.C. 1362(5)), it seems indisputable that the Act does not preclude respondents from suing petitioners under the pre-existing federal common law of nuisance. See, *e.g.*, *National Sea Clammers Association* v. *City of New York*, *supra*, 616 F.2d at 1233 n.31; *California Tahoe Regional Planning Agency* v. *Jennings*, *supra*, 594 F.2d at 193; Note, *Federal Common Law Remedies for the Abatement of Water Pollution*, 5 Ford. Urban L.J. 549, 557 (1977).

Other sections of the Act also support the court of appeals' conclusion that Congress did not intend to preempt

the federal common law of nuisance as it applies to this case. First, where Congress sought to preempt the application of other laws, it did so expressly. See Section 312(f)(1), 33 U.S.C. 1322(f)(1). No such explicit declaration governs a municipality's discharge of raw sewage into interstate waters, and particularly in light of the express language of Section 505(e), none should be lightly implied. See *Nader* v. *Allegheny Airlines, Inc.*, *supra*, 426 U.S. at 298–299; *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, *supra*, 204 U.S. at 437.[30]

Moreover, Sections 510 and 511 of the Act establish that, except as otherwise provided by the Act, neither a state nor any federal officer or agency is precluded from promulgating or enforcing more stringent pollution controls and standards than those required by the Act. 33 U.S.C. 1370 and 1371. See also 33 U.S.C. (Supp. II) 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"). In other words, all dischargers must meet the minimum level of effluent control set by EPA pursuant to the Act, and may, in addition, be required to meet more stringent standards established by other statutes or common law. See, *e.g.*, *Illinois* v. *Outboard Marine Corp.*, *supra*, 619 F.2d at 630; *United States Steel Corp.* v. *Train*, 556 F.2d 822 (7th Cir. 1977); *Homestake Mining Co.* v. *EPA*, 477 F. Supp. 1279, 1283–1284 (D. S.Dak. 1979).

In sum, the language of the Act offers no support for petitioners' preemption argument. To the contrary, it is

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[30] Petitioners contend (Br. 33–36) that because the Clean Water Act is sufficiently comprehensive and complete, there is no longer a need for a federal common law. In short, petitioners suggest that the Clean Water Act fully occupies the field of water pollution control. However, as we demonstrate in Point C, *infra*, the common law continues to play a vital role in this area. More important, since preemption is essentially a question of congressional intent, the express language of the Act should be deemed controlling, unless application of the common law would, in a particular case, utterly defeat the purposes of the Act. See, *e.g.*, *Nader* v. *Allegheny Airlines, Inc.*, *supra*; *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, *supra*.

apparent that Congress expressly contemplated that the federal government, the states, and even private citizens could bring suits under the federal common law or other laws to abate water pollution regardless of whether the particular discharger was in compliance with the effluent limitations and other regulations of the Act.

2. The legislative history of the Clean Water Act also refutes petitioners' preemption claim. The Senate Report accompanying the 1972 Act describes the congressional intent informing Section 505(e):

> It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.

S. Rep. No. 92-414, 92d Cong., 1st Sess. 81 (1971), *reprinted in 2 A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 1499 (Comm. Print 1973) (hereinafter "Leg. Hist.").[31] Likewise, the House Report explains that Section 505(e) "provides that the right of persons (or class of persons) to seek enforcement or other relief under any statute or *common law* is not affected." H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 134 (1972) (emphasis supplied), *reprinted in* 1 Leg. Hist. 821.

In addition, the contemporaneous legislative debates and hearings demonstrate that Congress specifically focused on the federal "common law of water pollution abatement" (1 Leg. Hist. 688) and concluded that enactment of the Clean Water Act would not limit or preclude such suits. See, *e.g.*, 1 Leg. Hist. 191-194, 211, 676; *Water Pollution Control Legislation: Hearings Before the*

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[31] Petitioners rely (Br. 41) on another passage from the Senate Report regarding Section 505. See S. Rep. No. 92-414, *supra*, at 79, reprinted at 2 Leg. Hist. 1497. But that statement refers only to the scope of citizen suits authorized by Section 505 and not to independent common law actions. In such enforcement suits, the courts may not reexamine the standards set by EPA.

Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 92d Cong., 1st Sess., Pt. 1, 643, 672, 687, 718, 720, 731 755 (1971) (hereinafter "Senate Hearings") ; *Water Pollution Control Legislation—1971: Hearings Before the House Comm. on Public Works*, 92d Cong., 1st Sess. 1028, 1109-1110, 1530, 1536, 1748 (1971). And, as evidenced by Section 505(e), Congress considered and rejected the alternative of preempting the common law and making citizen suits under Section 505 "the sole and exclusive method which citizens may participate in in this kind of litigation * * *." *Senate Hearings*, Pt. 1, at 724. See *id.* at 730-731, 1071-1077.

For example, in a colloquy on the floor of the Senate, Senator Griffin inquired whether passage of the Clean Water Act would affect in any way the then ongoing Reserve Mining Company litigation. 1 Leg. Hist. 191. The Senator specifically noted that this suit, which concerned the discharge of taconite tailings into Lake Superior, was based in part on the federal common law of "public nuisance" (*ibid.*). See *Reserve Mining Co.* v. *EPA*, 514 F.2d 492, 501 (8th Cir. 1975). Consistent with the position taken by EPA, Senators Muskie[32] and Hart replied that the Clean Water Act would not affect or hinder "the suit now pending against the Reserve Mining Co., under the Refuse Act of 1899 * * * [,] the existing Federal Water Pollution Control Act or *other law*." 1 Leg. Hist. 211 (emphasis supplied). See 1 Leg. Hist. 191-194; Senate Hearings, Pt. 1, at 1017-1020. See also 1 Leg. Hist. at 248 (similar colloquy between Reps. Dingell and Wright).

3. In striking contrast to their preemption argument, petitioners also contend that Section 505 provides for federal common law actions, but that Section 402(k) limits common law remedies to enforcement of the effluent lim-

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[32] Senator Muskie was the primary author of the Clean Water Act and his views are therefore entitled to particular weight. See, *e.g.*, *E.I. duPont deNemours & Co.* v. *Train*, *supra*, 430 U.S. at 129; *Simpson* v. *United States*, 435 U.S. 6, 13 (1978).

itations required by the Act.[33] Thus, petitioners cryptically suggest that "[s]ince compliance with [an NPDES] permit is specifically defined by Sec. 402(k) * * * as compliance with Sec. 505 * * *, and since common law actions are provided for in Sec. 505, it follows that [the terms of the permit] are the discharge limitations to which a discharger may be held under common law * * *" (Br. 55). This syllogism is seriously flawed in several respects.

First, petitioners ignore the plainly limited scope of Section 402(k). As the Court explained in *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 205 (1976), Section 402(k) merely provides that, for purposes of enforcement actions under Sections 309 and 505 of the Act, 33 U.S.C. (and Supp. II) 1319 and 1365, "a discharger in compliance with the terms and conditions of an NPDES permit is deemed to be in compliance with those sections of the [Act] on which the permit conditions are based." See 33 U.S.C. 1342(k).[34] Section 505 is not listed in Section 402(k) as one of the "sections of the [Act] on which the permit conditions are based." In view of the specific and exhaustive enumeration of statutory provisions covered by Section 402(k) (*i.e.*, Sections 301, 302, 306, 307 and 403, 33 U.S.C. (and Supp. II) 1311, 1312, 1316, 1317, and 1343), there is no basis for ignoring the express limitations set forth in Section 402(k). See, *e.g.*, *Lewis* v. *United States*, No. 78-1595 (Feb. 27, 1980), slip op. 7; *Andrus* v. *Allard*,

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[33] Petitioners' contention that Section 505 provides for common law actions contradicts petitioners' primary argument that federal common law suits would interfere with the congressional design inherent in the Clean Water Act. See Point C, *infra*. Indeed, petitioners' sole explanation of the language in Section 505(e) suggests that Congress purposefully created federal common law actions as part of the statutory scheme.

[34] The Court also recognized that compliance with the permit does not even constitute compliance with all provisions of the Act. See 426 U.S. at 205; 33 U.S.C. 1342(k) ("except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health"). See also *E. I. duPont deNemours & Co.* v. *Train*, *supra*, 430 U.S. at 138 n.28 ("The purpose of § 402(k) seems to be to insulate permit holders from changes in various [EPA] regulations during the period of a permit").

444 U.S. 51, 56 (1979); *Huddleston* v. *United States*, 415 U.S. 814, 822 (1974).

Furthermore, petitioners' argument is premised on an erroneous characterization of Section 505(e). That provision preserves rather than creates the federal common law of nuisance. In fact, as we have previously pointed out (Point A 1, *supra*), the federal common law regarding interstate pollution was well established by the time Congress enacted the Clean Water Act. Because federal common law suits are therefore not enforcement actions under Section 505 of the Act, Section 402(k) simply does not purport to address the limits and contours of the federal common law or any other requirement outside of the Act. Compare 33 U.S.C. 1371(a), (b) (dredge permits issued under Section 404 of the Act, 33 U.S.C. (Supp. II) 1344, generally satisfy requirements of Refuse Act, 33 U.S.C. 407, Rivers and Harbors Act of 1910, 33 U.S.C. 421, and Supervisory Harbors Act of 1888, 33 U.S.C. 441–451b).

Finally, the language and legislative history of the Act, as well as EPA's own regulations, show that "mere compliance with agency regulations is not sufficient in itself under the Act to exempt a [discharger] from common-law liability." *Nader* v. *Allegheny Airlines, Inc.*, *supra*, 426 U.S. at 308 n.19. Cf. *New Jersey* v. *City of New York*, 283 U.S. 473, 482–483 (1931); *Baltimore & Potomac R.R.* v. *Fifth Baptist Church*, 108 U.S. 317 (1883).[35] Thus, Sections 505(e) and 510 establish that, in addition to enforcing the terms of the Act, any interested person—including a state—may seek to enforce any other more stringent rights and remedies provided for by other statutes or common law. See 33 U.S.C. 1365(e), 1370. See also 33 U.S.C. (and Supp. II) 1251(b), 1311(b)(1)(C), and 1371. Likewise, the Senate report unequivocally states that

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[35] Although EPA's regulations "will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning such rules of decision." *Illinois* v. *City of Milwaukee*, *supra*, 406 U.S. at 103 n.5. Here, for example, the court of appeals considered EPA's effluent limitations and regulations in affirming in part and reversing in part the remedial order of the district court (Pet. App. A–20 to A–48).

"[c]ompliance with requirements under this Act would not be a defense to a common law action * * *." S. Rep. No. 92-414, *supra*, at 81, reprinted at 2 Leg. Hist. 1499. See Senate Hearings, Pt. 1, at 672. Accordingly, conformance to the terms of an NPDES permit does not "[a]uthorize any injury to private property or invasion of other private rights, or any infringement of Federal, State, or local laws or regulations." 40 C.F.R. 122.11(d)(2).[36]

C. Preservation of the Federal Common Law of Nuisance Will Effectuate the Policies and Goals of the Clean Water Act

1. Notwithstanding the plain meaning of the Act and its unambiguous legislative history, petitioners repeatedly suggest that continued recognition of an independent federal common law of nuisance will interfere with the administration and enforcement of the Act. The short answer to this claim is that Congress expressly preserved common law rights and remedies as a supplement to the statutory scheme. But, even if we ignore the specific savings clause of the Act, it is apparent that a federal common law suit to abate the discharge of raw sewage into Lake Michigan furthers the general policies of the Clean Water Act.[37]

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[36] EPA's administrative interpretation of the Act is entitled to great weight. See, *e.g.*, *E. I. duPont deNemours & Co.* v. *Train*, *supra*, 430 U.S. at 134-135 & n.25; *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256 (1976); *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 226-227 (1976); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 87 (1975).

[37] The legislative history of the Act shows that Congress was especially concerned about the discharge of raw sewage from sewer overflows and inadequate treatment plants (see, *e.g.*, 1 Leg. Hist. 96-97, 100-104, 115-116, 121, 128, 161-162, 165, 167, 184, 346-347, 385, 405, 426, 444, 479, 495, 572-574, 599-601, 769-770, 774-775, 862; 2 Leg. Hist. 1160-1161, 1215, 1228, 1246, 1253-1254, 1257, 1263, 1332, 1343, 1379, 1411-1412, 1423, 1458-1459), by the accelerated eutrophication of the Nation's lakes and ponds (see, *e.g.*, 1 Leg. Hist. 152, 347, 385-386, 430, 456-457, 461, 493-494, 500, 599, 644, 741; 2 Leg. Hist. 1155, 1337, 1340, 1462), and by the deteriorating quality of water in the Great Lakes (see, *e.g.*, 1 Leg. Hist. 498-500, 502-503, 504-506, 525, 571-572, 599-601, 747, 772-773; 2 Leg. Hist. 1194, 1279, 1333, 1336, 1339, 1408-1409, 1439). Accordingly, Section 101(a) broadly declares that it

Contrary to petitioners' assertions, application of the federal common law regarding interstate pollution will not in any way disrupt implementation or administration of the Act. Certainly, a conflict between the Act and the federal common law may not "be inferred merely from the comprehensive character of the federal [regulatory] provisions." *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405, 415 (1973). See *Nader* v. *Allegheny Airlines, Inc.*, *supra;* cf. *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973). And here, EPA has long concluded that federal common law is an essential supplement to the Clean Water Act, advancing rather than disrupting the goals and policies of the statute. See *Reserve Mining Co.* v. *EPA*, *supra*, 514 F.2d at 501; 40 C.F.R. 122.11(d). As the agency primarily responsible for administering and enforcing the Act, EPA's views on this point are entitled to substantial deference. See, *e.g.*, *Nader* v. *Allegheny Airlines, Inc.*, *supra*, 426 U.S. at 306–307; *E. I. duPont deNemours & Co.* v. *Train*, *supra*, 430 U.S. at 134–135 & n.25.

In any event, petitioners' allegations (Br. 33–46) about the potential friction between the Act and the federal common law of nuisance are without substance. We have already demonstrated that the "uniformity" of effluent limitations (*id.* at 37–43) contemplated by the Act is a *minimum* level of effluent control that may be exceeded by the requirements of other laws. See pages 7–8, 22, *supra;* 33 U.S.C. (and Supp. II) 1251(b), 1311(b)(1)(C), 1370, 1371; *Mianus River Preservation Comm.* v. *EPA*,

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is the objective of the Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and sets as a national goal "that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. 1251(a). The Act also sets as an interim goal the achievement by July 1, 1983, of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. 1251(a)(2). Finally, Section 101(b) makes clear that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution * * *." 33 U.S.C. (Supp. II) 1251(b).

541 F.2d 899, 906 (2d Cir. 1976). Petitioners also claim (Br. 45, 54–55) that the possibility of judgments under the common law will deter and delay the industrial and governmental planning and investments necessary to comply with the Act. But regardless of potential liability under other laws, dischargers must comply with the terms and deadlines of the Act.[38] Moreover, in applying common law nuisance principles the federal courts have means of tailoring the relief to the equities in each case.[39] See, *e.g.*, Comment, *Federal Common Law in Interstate Water Pollution Disputes*, 1973 U. Ill. L. F. 141, 151–159; Bryson & Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 Ecol. L. Q. 241, 264–275 (1972); *New Jersey* v. *City of New York*, *supra*, 283 U.S. at 483.[40]

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[38] Indeed, lack of federal funding does not excuse municipal noncompliance with the Act, although Congress modified the Act in 1977 to permit limited extensions where "the United States has failed to make financial assistance under this chapter available." 33 U.S.C. (Supp. II) 1311(i)(1). In no event may compliance be achieved later than July 1, 1983.

[39] As a general proposition, petitioners' fears that the federal courts will render belated or disproportionate remedial orders against municipalities or other dischargers under the federal common law are therefore unfounded. The United States did not participate in the extensive evidentiary proceedings in this case and it takes no position as to whether the courts below fashioned an appropriate remedy under the federal common law of nuisance in the circumstances presented here. We note that petitioners were aware of their potential liability under the common law before the Act was passed and were therefore able to take that possibility into account in planning their sewage treatment requirements.

Likewise, there is no conflict between the federal common law and Sections 212(2) and 217 of the Act, 33 U.S.C. (and Supp. II) 1292(2), 1297. See Pet. Br. 36–37. Those sections merely require that all federally-funded projects designed to meet the standards and requirements set in accordance with the Act are "the most cost efficient alternative." 33 U.S.C. 1292(2)(B).

[40] In adjudicating a federal common law claim, the district court must determine whether the defendant's activities constitute an actionable nuisance and must evaluate the choice of remedies in light of all the relevant factors, including the harmful impact and benefit, if any, of the discharger's conduct. See Comment, *supra*, 1973 U. Ill. L. F. at 151–159; Bryson & Macbeth, *supra*, 2 Ecol. L. Q. at 264–275. Because

2. Furthermore, as evidenced by the circumstances of this case, the federal common law continues to play a critical role in protecting the environment. In amending the Act in 1977, Congress expressly recognized that neither the Act nor EPA's regulations satisfactorily address the problem of combined storm and sanitary sewer overflows that underlies this suit.[41] See, *e.g.*, H.R. Conf. Rep. No. 95-830, 95th Cong., 1st Sess. 108 (1977), *reprinted in* 3 *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act*, 95th Cong., 2d Sess. 292 (Comm. Print 1978) (hereinafter "Cont. Leg. Hist."); S. Rep. No. 95-370, 95th Cong., 1st Sess. 81 (1977), *reprinted in* 4 Cont. Leg. Hist. 714. Accordingly, Congress directed the Administrator of EPA to prepare and submit "a report on the status of combined sewer overflows in municipal treatment works operations." Pub. L. No. 95-217, Section 70, 91 Stat. 1608, 33 U.S.C. (Supp. II) 1375(c).[42] Yet, until such time as Congress acts defini-

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the elements of a nuisance claim are matters particularly within the conventional experience of the federal courts (see *United Steelworkers* v. *United States*, 361 U.S. 39, 61-62 (1959) (Frankfurter and Harlan, J.J., concurring); *New Jersey* v. *City of New York*, *supra*; *Georgia* v. *Tennessee Copper Co.*, *supra*) and because adjudication of a nuisance claim does not involve setting national effluent limitations, evaluating industry-wide conditions, or other matters within the special expertise of EPA, the district courts are not required under the doctrine of primary jurisdiction to refer common law suits to the EPA in the first instance. See, *e.g.*, *Nader* v. *Allegheny Airlines*, *supra*, 426 U.S. at 303-307; *United States* v. *RCA*, 358 U.S. 334 (1959); *Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952). In fact, even under the Act, the courts adjudicate whether a discharger is in compliance with the terms of its permit. See 33 U.S.C. (and Supp. II) 1319, 1365. It would thus be highly anomalous if EPA, which does not even make administrative determinations regarding compliance with an NPDES permit, were required to determine whether particular discharges constitute a common law nuisance.

[41] Such overflows are not subject to the secondary treatment and best practicable waste treatment requirements applicable to publicly owned treatment works. See page 7, *supra*.

[42] This report was issued in October 1978. See EPA, *Report To Congress On Control of Combined Sewer Overflow In The United States* (1978).

tively, the federal common law may well be the only substantial source of protection against interstate pollution caused by combined sewer overflows.[43]

The federal common law regarding interstate water pollution supplements the federal environmental regulatory scheme in still other critical ways. For example, although EPA has established standards for secondary treatment, it does not specifically regulate a municipality's discharge of pathogens, fecal coliforms, and phosphorous—the very pollutants whose discharge is the basis for the remedial order in this case. Particularly where, as here, one state seeks to abate pollution emanating from another state, the federal common law may therefore be the only effective basis for relief.[44] Moreover, in those pollution disputes in which damages are more appropriate than injunctive relief (see, *e.g.*,

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[43] Petitioners erroneously suggest (Br. 34–35) that the Act supplies several different adequate remedies. In fact, however, Illinois has adopted more stringent pollution control standards regarding Lake Michigan than has Wisconsin, but is unable (under the Act) to compel Wisconsin to adopt similarly high standards. To be sure, the Act provides that a state whose waters are affected by discharges in another state may *recommend* that the other state adopt more stringent water quality standards or impose higher standards in particular permits. See 33 U.S.C. 1342(b)(3), 1342(b)(5), 1313(c). But neither the courts nor the Administrator are authorized to reject a permit or a state water quality standard that is in compliance with the terms of the Act and existing EPA regulations. See 33 U.S.C. (and Supp. II) 1313(c)(3), 1342(d)(2), 1369(b). The federal common law thus serves the critical functions of protecting the states' quasi-sovereign interests regarding the quality of its waters and also of abating the otherwise unregulated or underregulated pollution of interstate and navigable waters. See Comment, *Federal Common Law In Interstate Water Pollution Disputes*, 1973 U. Ill. L. F. 141, 159–160.

[44] Even where EPA has regulated a particular type of discharge, it has done so on a national basis. Without relief under the federal common law, a state or private person may be powerless to limit or abate interstate discharges that, although in compliance with EPA regulations, cause significant harm "in the context of localized situations." *Washington* v. *General Motors Corp.*, 406 U.S. 109, 116 (1972).

Harrisonville v. *W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 338–339 (1933); *Boomer* v. *Atlantic Cement Co., Inc.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.2d 312 (1970)), the federal common law alone can supply a suitable remedy since the Clean Water Act only provides for equitable relief and limited civil penalties. See Zener, *The Federal Law of Water Pollution Control, reprinted in* Environmental Law Institute, *Federal Environmental Law* 682, 790 (ed. Dolgin & Guilbert 1974). Cf. *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 201–206 (1967). And both the states and the federal government have invoked the federal common law as a basis for remedying the discharge of toxic chemicals that occurred prior to the enactment of the Clean Water Act. See, *e.g.*, *Illinois* v. *Outboard Marine Corp.*, *supra; United States* v. *Solvents Recovery Service*, Civ. No. H 79–704 (D. Conn., filed Aug. 20, 1980); *United States* v. *Hooker Chemicals & Plastic Corp.*, No. 79–990 (W.D. N.Y., filed Dec. 20, 1979) (Love Canal litigation). In short, there is still a pressing need for the federal common law of nuisance regarding water pollution.

CONCLUSION

Insofar as the court of appeals held that the Clean Water Act does not preempt or limit the federal common law of nuisance, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-408

City of Milwaukee, The Sewerage Commission Of The City of Milwaukee, And The Metropolitan Sewerage Commission Of The County Of Milwaukee,
Petitioners,

vs.

People Of The State Of Illinois And People Of The State Of Michigan,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For the Seventh Circuit

BRIEF AMICUS CURIAE OF THE STATE OF WISCONSIN

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BRIEF AMICUS CURIAE OF THE STATE OF WISCONSIN

STATEMENT OF THE CASE

We respectfully request the Court to refer to the Citation of Opinions Below, the Statement of Jurisdiction, the Citation of Statutory Provisions Involved, and the Statement of the Case presented in the brief of the City of Milwaukee, et al., filed with the Court in this proceeding.

The State of Wisconsin, by its Attorney General, respectfully submits this brief amicus curiae, in support of the appeal of the City of Milwaukee, et al., pursuant to Rule 42 (4) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Has the federal common law of nuisance survived the enactment of the Federal Water Pollution Control Act of 1972 (hereinafter FWPCA)?

2. If it has, what degree of deference should a federal court exercising that jurisdiction pay to the national regulatory scheme established by the FWPCA and to state action under that Act to enforce its requirements?

INTEREST OF AMICUS CURIAE

The United States Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 33 U.S.C. secs. 1251-1376, to provide a comprehensive, uniform, and national solution to the problem of pollution of the waters of the United States. Pursuant to sec. 402(b), 33 U.S.C. sec. 1342(b), of the Act, the enforcement obligations of the National Pollutant Discharge Elimination System in the State of Wisconsin were delegated to the Wisconsin Department of Natural Resources and the Attorney General

of the State of Wisconsin. In order to fulfill those obligations, ch. 147 of the Wisconsin Statutes was enacted in 1974. The Wisconsin Pollutant Discharge Elimination System (WPDES) created by ch. 147, Wis. Stats., is consistent with the requirements of the federal act.

Pursuant to the requirements of these state and federal laws, the Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee (hereinafter "the Commissions") applied for and obtained WPDES permits from the State of Wisconsin (hereinafter "the State") for the operation of their sewage collection and treatment facilities. When the Commissions violated the requirements of those permits, issued under ch. 147, Wis. Stats., the State of Wisconsin brought suit to enforce the requirements of the law and to secure abatement of water pollution in the area served by the Commissions.

On May 25, 1977, the State of Wisconsin concluded its enforcement action in State Circuit Court against the two Commissions with a judgment which complies with federal and state water pollution laws and standards, which comprehensively addresses the attainment of effluent limitations and abatement of combined sewer overflows, and which adequately protects the interests of residents of Illinois, Michigan, and Wisconsin in limiting discharges of pollutants to Lake Michigan.

On November 15, 1977, the United States District Court for the Northern District of Illinois concluded a suit brought by the State of Illinois against the City of Milwaukee, et al., under the federal common law of nuisance, by entering a judgment requiring the Commissions to treat all sewage to meet certain effluent limitations six times more stringent than those required under the FWPCA and to construct a

system to eliminate all overflows of raw sewage from combined sanitary and storm sewers. On April 26, 1979, the Court of Appeals for the Seventh Circuit reversed the order of the District Court insofar as it imposed effluent limitations stricter than those required under the FWPCA. It affirmed that part of the order requiring the elimination of all sewage overflows outside the combined sewer system by July 1, 1986, and further requiring the construction of a collection and conveyance system for the combined sewer system that will eliminate overflows in the combined sewer system by December 31, 1989.

The suit in the United States District Court was brought to address the same problems and to protect interests identical to those resolved in the suit in state court. While the exercise of jurisdiction by a United States District Court in these circumstances may appear compatible with that of Wisconsin, this is not in fact the case. Although attempting to reach similar goals, the remedies of the two courts may conflict in such a fashion as to frustrate the efforts of the State of Wisconsin and to usurp its enforcement authority.

This fact has far-reaching implications for the State of Wisconsin and all other states with delegated authority under the FWPCA or the Clean Water Act of 1977 (hereinafter CWA), Pub. L. No. 95-217, 33 U.S.C. secs. 1251-1376. If other jurisdictions may rely on the federal common law of nuisance as Illinois did here, while choosing to ignore the opportunities provided for participation in and enforcement through the NPDES process, conflicting results, multiplicity of suits, and frustration of the national goal of clean water will be the result. Such disruption of the NPDES state administrative and enforcement process undermines its integrity.

Accordingly, the State of Wisconsin urges this Court to determine what, if any, vitality the federal common law of nuisance maintains with respect to water pollution control suits in light of the FWPCA and the CWA. We do not dispute that a common law cause of action for nuisance may lie in an appropriate case. This is not such a case. Specific standards of pollution control have been set under comprehensive congressional legislation. Such standards must supersede the setting of others based on a federal common law. Moreover, even in areas of pollution control not specifically addressed in otherwise comprehensive legislation, the federal court is obliged to fashion a remedy consistent with the congressional program's demands, especially where a decision is likely to have a substantial effect on that program. Finally, we urge this Court to declare for the benefit of local, state, and federal government that, even where a federal court might properly exercise federal common law jurisdiction in the water pollution area, when the responsible state authorities are clearly fulfilling their enforcement obligations under the national regulatory scheme, the federal court must defer to the State's expertise in establishing the remedy.

This Court should be very wary of suggestions that the remedy imposed by the State, pursuant to congressional mandate, is not adequate. After all, the citizens of Milwaukee, Kewaunee, Manitowoc, Sheboygan, Racine, and Kenosha, Wisconsin, have as much interest in clean Lake Michigan water for drinking and recreation as do citizens of Illinois. Indeed, being closer to the source of the alleged pollution they and their state government have more reason to be concerned than does Illinois.

ARGUMENT

I. The 1977 Wisconsin Judgment Is A Major Commitment By The Petitioner Sewerage Commissions To Abatement Of Water Pollution And Will Adequately Protect The Citizens Of Illinois, Michigan, and Wisconsin.

Legal action by the State to enforce federal and state water pollution requirements culminated on May 25, 1977, in the entry of a detailed stipulation between the State and the Commissions which is incorporated in the Wisconsin Judgment. [*The Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee v. State of Wisconsin Department of Natural Resources,* Case No. 152-342, Cir. Ct., Dane County.] The commitment made by the Commissions extends over several decades and represents a major undertaking in terms of federal, state, and local dollars expended and level of treatment achieved.

The Wisconsin Judgment is divided into sections, each of which addresses a different aspect of the water pollution problem in Milwaukee. In brief summary, the Wisconsin Judgment requires the Commissions to comply with applicable effluent limitations, to eliminate any dry weather bypassing within the service area, to eliminate all wet weather bypassing, to correct all combined sewer overflows, and to restrict all sources of additional waste flow into the system, all by prescribed deadlines. Each deadline established is specifically related to the others, so that constant maximum effort based upon established priorities is assured.

The Wisconsin Judgment is a comprehensive and balanced approach to the sources of water pollution within the control of the two Commissions. It requires the Commissions to undertake long-term, complex abatement efforts and to complete projects and components of those projects in compliance with a detailed and carefully developed schedule of deadlines. The Wisconsin Judgment exemplifies the complex and large scale nature of water pollution abatement in a major metropolitan area. But more importantly in the current context, it exemplifies the State of Wisconsin's determination to fulfill its obligations to the citizens of Wisconsin as well as other states to secure and maintain clean water within its jurisdiction, and to fully and adequately enforce the requirements of the Federal Water Pollution Control Act and the NPDES/WPDES program.

II. Congress Intended To Create A Comprehensive Scheme Of Regulation, And A Remedy Developed Pursuant To This Scheme Must Preempt Federal Common Law Approaches.

Wisconsin submits that the statutory pattern created by Congress and the legislative history to the Act shows it intended that there be a single federal decision-maker directing a comprehensive program of abatement of industrial and municipal discharges to the nation's navigable waters. *Ad hoc* approaches to solving the problems of pollution of our nation's waters were specifically rejected:

> Water pollution control in the past has all too often been sporadic, inconsistent, and improvised on an ad hoc basis. *The major purpose of this legislation is to establish a*

> *comprehensive long-range policy for the elimination of water pollution,* making it clear to industry and municipalities alike the pollution control performance which will be expected over the next decade. At the same time, the bill provides a mechanism for generating sound, detailed information on the costs which will be associated with the later stages of the control program, and allow subsequent Congresses to evaluate the success of the policy enunciated in this bill.

[1972] *U.S. Code Cong. & Ad. News* 3758 (emphasis added).

The key to accomplishing Congress' long-range goals lay in its charge to EPA to establish and then apply direct discharge limitations to all polluters of the nation's waters. It directed EPA to develop these limitations based on the best pollution control technology which industry was capable of producing. The technological standards, once established in the administrative process,[1]/ would provide

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[1]/That it intended EPA, and EPA alone, to assume the responsibility of developing the necessary technological expertise to develop a sound program of regulation is evident from the remarks of the Senate Committee on Public Works (in reference to the "citizen suit" provision of the Act):

> Section 505 would not substitute a "common law" or court-developed definition of water quality. An alleged violation of an effluent control limitation or standard, would not require reanalysis of technological in [sic] other considerations at the enforcement stage. *These matters will have been settled in the administrative procedure leading to the es-*

"manageable and precise benchmarks for enforcement," *Id.* at 3747, and courts would be relieved of the difficult technological inquiries and determinations required in this area.[2]/ Congress' wisdom in this regard is amply illustrated by the following remarks of the District Court Judge:

> Ordinarily, when the trier of fact weighs evidence and attempts to come to factual conclusions, he does so in the light of his own experience and his own observations and his own common sense. Not only is this proper to do, it is something that we specifically instruct juries to do in every jury case.
>
> The nature of the subject matter here, however, is such that my own experience and observations in life are of relatively little use to me. It is well known to all of us that the arcane subject matter of some of the expert testimony in this case was sometimes over the

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> *tablishment of such effluent control provision.* Therefore, an objective evidentiary standard will have to be met by any citizen who brings an action under this section.

[1972] *U.S. Code Cong. & Ad. News* 3745 (emphasis added).

[2]/Congress specifically noted that the courts simply do not have the technological resources to assume the role of developing pollution control standards:

> Enforcement of pollution regulations [once established by the EPA under the statutory scheme] is not a technical matter beyond the competence of the courts. The citizen suit provision is consistent with principles underly-

> heads of all of us to one height or another. I would certainly be less than candid if I did not acknowledge that grasp of some of the testimony was less complete than I would like it to be, but short of enrolling in a university course directed toward a reorientation of my entire education and spending the years that that would involve, I know of no remedy for the problem.

P-Ap. F-3 and 4.

The Court of Appeals noted that Congress left the door open for states to adopt standards more stringent than those set by EPA and concluded that precise uniformity was not a congressional goal. *Illinois v. City of Milwaukee,* 599 F.2d 151, 162, 164 (7th Cir. 1979). State-setting of stricter standards, however, is in keeping with the overall congressional scheme in a way that court-setting of standards is not. All state standards are adopted according to federal statutory guidelines and the state's programs are under continuing federal regulatory guidance. State-set stricter standards are a logical part of the uniform statutory scheme because they promote more vigorous anti-pollution efforts where circumstances warrant. Such standards, however, are set under the continuing supervision of the single federal oversight agency by a state agency with expertise and long-term responsibility. The critical management role assigned to the states

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> ing the Federal Water Pollution Control Act, that is the development of clear and identifiable requirements. Such requirements should provide manageable and precise benchmarks for enforcement.

[1972] *U.S. Code Cong. & Ad. News* 3747.

is consistent with the development of a uniform, "comprehensive long-range policy for the elimination of water pollution." [1972] *U. S. Code Cong. & Ad. News* 3758.[3]/ The common denominator in the process is supervision by the EPA and ultimate control by Congress. When litigants call upon courts to establish discharge limitations without regard to the congressional program, the courts, if they proceed, do so without the technological expertise forged in the administrative process, and without the guidance of the expert regulatory body.[4]/

The *ad hoc* problem-solving urged on the court in this case creates uncertainty and disarray and represents just the kind of approach Congress was seeking to avoid. It also contravenes basic interests of federalism, which demand that independent judicial remedies fashioned under a federal common law give way to congressional judgment expressed in comprehensive legislation.

The traditional sources of federal law are the federal constitution, treaties, and statutes. In *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), this Court

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[3]/It is also consistent with Congress' stated policy to "recognize, preserve and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution." Sec. 1251 (b).

[4]/*Ad hoc* judicial creation and enforcement of controls without regard to the FWPCA is inconsistent with the further objective of the Act to "mak[e] it clear to industry and municipalities alike the pollution control performance which will be expected over the next decade."

[1972] *U.S. Code Cong. & Ad. News* 3758.

declared that there is no general federal common law. Although some federal common law has developed to resolve significant federal problems not addressed by traditional federal law sources and not appropriately resolved by resort to the varying laws of the 50 states, *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943), *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957), independent judicial determination of applicable rules of law remains the exception, not the rule. *Wheeldin v. Wheeler,* 373 U.S. 647, 651 (1963). A comprehensive congressional scheme supersedes regulation by way of resort to common law standards. And even where federal statutes are silent, courts are obliged to adhere to the policy expressed by Congress in comprehensive legislative programs. *Illinois v. Milwaukee,* 406 U.S. 91, 103 n.5 (1972); *United States v. Carson,* 372 F.2d 429, 432 (6th Cir. 1967).

Some federal common law of nuisance has emerged in the specific context of interstate pollution controversies where needed to fill in gaps in legislation and to provide a uniform rule of decision where the alternative is to apply the laws of the various states. In *Arizona v. California,* 373 U.S. 546 (1963), this Court held that an interstate dispute over water rights had to be resolved pursuant to the comprehensive scheme of allocation created by Congress, rather than according to common law rules of equitable apportionment. On the other hand, no comprehensive congressional scheme existed to resolve the interstate pollution dispute presented in *Texas v. Pankey,* 441 F.2d 236 (10th Cir. 1971) and, accordingly, the court turned to the federal common law to ensure a uniform basis for decision: "Federal common law *and not the varying common law of the individual States* is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." *Pankey* at

241 (emphasis added). However, just "[a]s the field of federal common law has been given necessary expansion into matters of federal concern ... (where no applicable federal statute exists ...)," *Pankey* at 240, so does the field of federal common law necessarily contract where Congress has expressed its will in comprehensive legislation: "Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with [these problems] ..." *Pankey* at 241.

This Court in *Illinois v. Milwaukee,* 406 U.S. 91 (1972), declared the existence of a federal common law right of action to abate pollution of interstate waters. This decision, the State submits, was a direct and necessary response to the many procedural and substantive inadequacies of the then-existing federal statutes in this area. The pre-1972 Federal Water Pollution Control Act did not mandate minimum effluent discharge standards; the Act simply authorized each state to adopt "water quality criteria applicable to interstate waters or portions thereof" within the state, *see* 33 U.S.C. sec. 1160 (c) (1). This Court has described enforcement procedures under the Act as "cumbrous," "long," and "drawn out." *Illinois v. Milwaukee,* 599 F.2d at 158, quoting *E.P.A. v. Cal. ex rel St. Water Res. Control Bd.,* 426 U.S. 200, 202 (1976) and *Illinois v. Milwaukee,* 406 U.S. at 103. Only the federal government, through the Secretary of Interior and the Attorney General, could seek court enforcement of the Act. There was no mechanism by which the states or private citizens could seek direct enforcement. Therefore, at the time this Court decided *Illinois v. Milwaukee,* the Act provided no authority for Illinois to enforce its provisions against an entity of a neighboring state. Moreover, as this Court noted, "[t]he remedy sought by Illinois [was] not within the precise scope of remedies prescribed by Congress." *Illinois v.*

Milwaukee, 406 U.S. at 103. Accordingly, the Court turned then to the common law as a "necessary expedient" to resolve the interstate pollution controversy brought before it. *Committee For Jones Falls Sewage System v. Train,* 539 F.2d 1006, 1008 (4th Cir. 1976).

With the passage of the new Act, such resort to common law theories is no longer necessary. Enforcement procedures have been "greatly strengthen[ed]." *Illinois v. Milwaukee,* 599 F.2d at 158. Now, any "person ... having an interest which is or may be adversely affected" has a right to sue to secure compliance with the Act against any person alleged to be in violation, sec. 505(g). States may invoke the power of the EPA to abate pollution originating outside their borders; under sec. 505(h) the EPA's aid in such cases is obligatory. Section 505(h) also gives the governor of any state the right to file civil suit against regulatory officials if they fail to enforce an effluent standard set under the Act.

The new Act also constituted a major revision in substantive terms. It declared unlawful all discharges of pollutants, except as authorized under National Pollutant Discharge Elimination System (NPDES) permit. Direct discharge limitations, based on technology, are prescribed by EPA and authorized state agencies for all industrial and municipal dischargers of pollutants into the nation's waterways. Opportunities are provided for other affected states to comment on the appropriateness of the limitations to be imposed on any discharger, secs. 402 (b) (3), (5).

This Court in *Illinois v. Milwaukee,* 406 U.S. at 107, foresaw the time where "new federal laws and new federal regulations may ... preempt the field of federal common law of nuisance." In fact that time has arrived. The Act's procedural and substantive

gaps have been filled. States now have both effective enforcement authority under the Act and appropriate opportunities to participate in the administrative standard-setting process in other states. The remedy sought by Illinois — the setting of effluent standards and limitations — is now within "the precise scope of remedies prescribed by Congress." The current statutory scheme nullifies both the reason and the necessity for resort to federal common law to set standards and limitations to control discharges of pollutants into interstate waters.

Accordingly, "federal common law [in this area] of course must give way to federal statutes." *Handbook on Environmental Law* (West Pub. Co. 1977) at p. 154.[5]/

Because the Court of Appeals reasoned that the Act did not expressly govern the matter of control of overflow discharges, *Illinois v. Milwaukee,* 599 F.2d at 170, it concluded that the Act did not limit the relief available to correct combined sewer overflows under a

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[5]/The author of the *Handbook* also concluded that "[t]he immediate reach of Illinois v. Milwaukee was narrowed by the Federal Water Pollution Control Act Amendments of 1972. Application of the federal common law in the future requires the courts to be alert to whether Congress has made a clear choice in confining the range of available remedies."

The Eighth Circuit Court of Appeals has also expressed reluctance to fashion federal common law in light of the comprehensiveness of the amended FWPCA. In *Reserve Min. Co. v. Environmental Protection Agcy,* 514 F.2d 492, 532 (8th Cir. 1975), which involved an action brought by the United States and the State of Minnesota against a taconite

common law theory. However, it acknowledged that even where a statute does not expressly govern a particular case, a court "should look to its policies and principles for guidance," *Illinois v. Milwaukee*, 599 F.2d at 164. Wisconsin submits that congressional policy concerning combined sewer overflows as expressed in other provisions of the Act and especially as administered in the NPDES permit system should have guided the court in fashioning relief here.

As recognized by the Court of Appeals, regulation of combined sewer overflows is implicit in the provisions of the Act prohibiting discharges for public treatment works not meeting secondary treatment requirements, *Id.* Accordingly, the discharge permits issued to Milwaukee required it to "'initiate' programs 'leading to the elimination or control of all discharge overflow and/or bypass points.'" *Id.* Moreover, the state court suit brought to enforce the provisions of Milwaukee's permits imposed a comprehensive obligation on the city to correct the problem of overflows from its combined sewer system. *Id.* The plan for correction requires the expenditure of many millions of dollars over a period of many years, and it is inextricably intertwined with other provisions of the judgment requiring upgrading of Milwaukee's sewage

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processing company to prevent the company from continuing the discharge of wastes into Lake Superior, the court of appeals declared:

> The district court also found that Reserve's discharge into Lake Superior constituted a nuisance under the federal common law of nuisance ... Because relief may appropriately rest on provisions of the FWCPA and on a violation of the Refuse Act, we deem it unnecessary and, indeed, unwise to also rely on federal nuisance law.

treatment facilities and requiring the city to coordinate a district-wide effort to correct overflow problems in the separate sewer systems of nearby municipalities.[6]/

Correction of combined sewer overflows is an integral part of the comprehensive remedial program ordered by the State to implement congressional policy as expressed in comprehensive legislation. In contrast, the remedy ordered by the district court and sustained on appeal, which disregards the judgment of the state as to both the substantive relief measures required and the carefully-planned schedule by which they must be completed, can only disrupt the NPDES state enforcement process. Wisconsin believes that such undermining of its efforts should not be lightly approved, for "[w]here a decision is likely to have a substantial effect on the implementation of a federal program, then a federal court should declare a rule consistent with the program's demands." *United States v. Carson,* 372 F.2d 429, 432 (6th Cir. 1967).

The remedy ordered by the district court also undermines the comprehensive administrative process of regulation created by Congress to resolve issues of interstate pollution. That process requires states to

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[6]/It is important to understand how the Wisconsin Judgment requirement that Milwaukee correct all combined sewer overflows differs from the requirement of the Illinois district court to eliminate all combined sewer overflows. The regulations established by EPA under the Federal Water Pollution Control Act Amendments of 1972 require preparation of a detailed Facilities Plan, an overall analysis of the pollution abatement problems to be addressed with an analysis of the technological alternatives available as remedies. The purpose of the Facilities Plan preparation is to determine the most "cost-effective" means of providing the abatement necessary. "Cost-effective" has been

notify other states when permits which may affect their interests are proposed, issued, or modified. Congress has also required that such affected state, on request, be afforded a hearing on any permit application or the terms and conditions incorporated into any issued permit or permit modification.[7]/

The State of Illinois receives notice of all permit actions affecting Lake Michigan. It received notice of the original permits proposed for the Milwaukee treatment plants in 1974, and notice again when those permits were issued in late 1974 and early in 1975. Similarly, the State of Illinois received notice of the Department's intention to reissue permits to South Shore and Jones Island in 1978, and notice of the actual reissuance of those permits in 1978.

One of the terms and conditions of the permits issued to Milwaukee was an obligation to initiate measures to control combined sewer overflows. Illinois

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defined in 40 C.F.R. Part 35, Appendix A (1979), to mean:

> b. *Cost-effectiveness analysis.* An analysis performed to determine which waste treatment management system or component part will result in the minimum total resources costs over time to meet Federal, State, or local requirements.

The State of Wisconsin's definition of "cost-effectiveness" is in accord with the federal. Section NR 110.03 (3), Wis. Adm. Code, defines the concept as follows:

> "Cost-effective analysis" means a systematic comparison of alternative means of meeting state water quality standards, effluent limitations or other treatment standards in

clearly had many opportunities to comment on the remedial steps required to resolve the combined sewer overflow problem, yet it never took any of these opportunities to "make its case" against Milwaukee in the administrative forum. At no time did Illinois submit comments to the Department of Natural Resources on the Milwaukee permits, participate in permit hearings, or seek a hearing on its own motion. *The State of Illinois has totally refused to utilize that administrative forum, with its technical expertise, which remains available to it* for purposes of making its case. It chose instead to present its case in the judicial forum, where the expertise does not exist, and in so doing ignored the forum for resolution of these issues which Congress clearly intended. It seems reasonable that the congressional purpose of developing effective pollution control programs through application of sound technology forged in the administrative process should not be defeated by remedies created outside that process. The regulatory

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order to identify the alternative which will minimize the total resources costs over the planning period. These resources costs include monetary costs and environmental as well as other non-monetary costs.

At the completion of the Facilities Planning process the precise remedy to the combined sewer overflows will be determined by the Wisconsin Department of Natural Resources and Department of Justice as required by the Wisconsin Judgment based on the comprehensive and detailed analysis of the problem and the available remedies. In contrast, the order of the Illinois court was based on limited information as to both the nature of the problem as well as the technological alternatives available and the remedial benefit of each such alternative.

process created by Congress to resolve these issues must govern as to the remedial measures to be imposed. *See Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 491 2nd Cir. (1968).

Moreover, in this case, not only has Congress provided a comprehensive statutory program of regulation inconsistent with a common law patchwork, but also the specific problem presented to the federal court for decision had been addressed and resolved in the state court. The case for congressional preemption must be even stronger where, as here, congressional policy has already been applied at the time the federal judiciary is called upon to act.

The remedy imposed by the State represents application of the highest scientific expertise, conforms to the long-range goals set by Congress, and is consistent with uniform, orderly administration and enforcement of our nation's water pollution control program. The judgment of the federal court leads to regulatory chaos. Progress toward consistent, uniform improvement in water quality demands that solutions to problems of water pollution flowing directly from the congressional mandate preempt conflicting procedures.

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[7]/Wisconsin statutory sections securing these rights include secs. 147.09, 147.11, 147.13, and 147.20, Wis. Stats.

III. Assuming That A Federal Common Law Nuisance Action Survives, The District Court Should Have Deferred To The Judgment Of The Wisconsin State Court Entered Pursuant To State And Federal NPDES Requirements And Refrained From Imposing A Different Remedy.

The Seventh Circuit specifically considered and rejected the argument that the enactment of the FWPCA had preempted the federal common law of nuisance in the area of water pollution. Should this Court sustain that determination, a question of equal if not greater importance remains: how are the two authorities to operate effectively in the same arena?

Municipalities across the nation will suffer much confusion and unnecessary expense if guidelines on the use of federal common law are not developed by this Court. Similarly, those states such as Wisconsin which are charged with fulfilling their obligations under the national NPDES scheme will find their efforts frustrated, subject to collateral attack, and possibly countermanded by federal courts which choose to fashion remedies completely independent of those imposed by the state.[8]/

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[8]/It is the State's position that compliance with state law is required regardless of whether federal financial assistance can be made available. However, the State agrees that in a situation such as that faced by Milwaukee, where the pollution abatement program necessary to comply with the law will extend over several decades and cost hundreds of millions of dollars, cost to the taxpayers can and should be

The abatement program developed by the State of Wisconsin pursuant to the comprehensive NPDES regulatory scheme must preempt the *ad hoc* problem solving engaged in by the federal court. Basic principles of abstention and comity demand that independent judicial approaches to problem-solving in this area give way to programs developed under congressional authorization.

A. Comity and Abstention.

Had the State of Wisconsin initiated its action against the Milwaukee Commissions prior to the filing of the federal action, we would emphatically assert that the doctrine of abstention required the federal court to refuse to exercise its jurisdiction.

Abstention is proper for reasons of judicial economy so that one lawsuit will suffice to dispose of the problem, rather than permitting two with the possibility of conflicting results as well as multiple costs. *White v. Husky Oil Co.*, 266 F. Supp. 239 (D. Mont. 1967). Equitable restraint should be exercised by a federal court where granting of relief would adversely affect the results of a state court action. *Sartin v. Commissioner of Public Safety of St. Of Minn.*, 535 F.2d 430 (8th Cir. 1976). Further, it is the duty of a federal court to avoid unseemly conflict with a state court. *Landis v. Northern American Co.*, 299 U.S. 248 (1936). Implicit in these pronouncements is the notion

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recognized in the *timetable* established for compliance. The Wisconsin Judgment specifically treats the issues of compliance with the requirements and means of financing separately and in this fashion by establishing priorities and interrelated deadlines for the projects. The federal court's disregard for cost and priorities imposed by Wisconsin threatens the State's carefully laid plans for abatement.

that an action involving substantially the same question is pending in another forum which can provide an adequate remedy. *Butler v. Judge of U.S. District Court,* 116 F.2d 1013 (9th Cir. 1941). Neither the parties in the state court nor the issues need be identical. *Landis.*

Abstention is an equitable doctrine founded on the court's exercise of judicial discretion, to be exercised when the federal district court believes that some asset peculiar to the state court's jurisdiction will most likely aid in adjudicating the merits of the litigation. *Cochran v. Ensweiler,* 372 F. Supp. 471, 473 (D.C. Ind. 1974). Although it is clear that the doctrine of abstention is not normally invoked when, as here, the federal action was initiated first, the guiding principles of that doctrine and the doctrine of comity strongly support the State's position that substantial deference to the state court and the NPDES requirements was required when the federal court reached the point of establishing the proper remedy. The "asset peculiar to the state court's jurisdiction" in this case is that it had already imposed a remedy consistent with the requirements of the federal and state NPDES programs to solve the identical problem the federal court action sought to resolve. Federal court invocation of the comity principle at the point of establishing the remedy would have had substantial value here in securing uniformity of decision and remedy. *Lauer v. Freudenthal,* 96 Wash. 394, 165 P. 98 (1917).

Our constitutional system recognizes the principle of deference by one branch of government to another within each branch's sphere of influence. Congress, a coordinate political department, has constitutional authority to regulate and protect interstate waterways. The specialized nature of the subject requires deference. The correction of overflows from combined sanitary and storm sewers, for example, involves

technical determinations to which the courts bring little expertise. The district court admitted it found the data presented incomprehensible. Congress gave the EPA the primary task of administering the program, and gave it authority, in turn, to delegate this responsibility to the various states. The expertise employed by the State of Wisconsin Department of Natural Resources in designing a remedy for the water pollution problem here was employed pursuant to the delegation of authority from the EPA and ultimately the Congress. The remedy imposed on Milwaukee derived, then, from the congressional mandate. The state court judgment was entered pursuant to the comprehensive federal scheme embodied in federal statutes.

The trial court should have deferred to the legislative judgment and accepted as its guide the decision of the Congress regarding what is necessary to protect interstate waters. At the very least it was incumbent upon the federal court to inform itself of the requirements of the Wisconsin Judgment and to reach a determination as to that remedy's ability to meet the needs of the plaintiffs, Illinois and Michigan. Absent such an evidentiary determination regarding the state's remedy, the federal court was unable to determine the need for it to act. Had such an inquiry been made and had the court been satisfied, as we submit it would, that the state remedy was sufficient, it should then have deferred to that expertise in establishing the remedy. Failing to do so, a federal court risks interruption and frustration of the national pollution abatement process which Congress intended to establish.

This principle of deference is akin to the separation of powers doctrine and is best explained in terms of its similarity to the political question doctrine under

which courts decline to decide issues more properly resolved by another branch of government.

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards of resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decison already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

This Court has declared "in the abstention context," that "the federal court should not exert jurisdiction if the plaintiffs had an *opportunity* to present their federal claims in the state proceedings." *Moore v. Sims,* 99 S.Ct. 2371, 2378 (1979), quoting *Juidice v. Vail,* 430 U.S. 327, 337 (1977) (emphasis in original). Under similar principles, Wisconsin submits, Illinois should have utilized the opportunities available to participate in the state permit-issuing process. The NPDES/WPDES program provided an adequate administrative forum for consideration of the water pollution and public health related issues raised by Illinois. Illinois chose to ignore this process and instead go to the federal court.

B. Lack of Emergency.

Under well-settled principles of equity jurisprudence, injunctive relief should be granted only when the right to relief is clear. *Missouri v. Illinois,* 180 U.S. 208, 248 (1901). Moreover, "[t]he *Younger* doctrine, which counsels federal court abstention when there is a pending state proceeding, reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff." *Moore v. Sims,* 99 S.Ct. 2371, 2377 (1979). Plainly, there was no compelling need for the court to impose the remedy it did. There was no sudden, dramatic increase in the rate or amount of effluents discharged into the lake, no sudden decrease in water quality near Chicago attributable to Milwaukee, and no evidence of a water-borne outbreak of disease among Chicago residents. Furthermore, the remedy, involving tremendous additional costs to Milwaukee area residents, was imposed without evidence that commensurate additional benefits would accrue to Illinois.

Similarly, we suggest that under established principles of abstention, comity and judicial deference to legislative judgment a court is obliged to act, if at all, with great restraint. We respectfully suggest that if this Court finds that the federal common law of nuisance survives the federal Act, the Court must fashion and require strict adherence to a rule limiting exercise of jurisdiction in these cases to genuine emergency cases, imposing liability only on a clear and convincing showing of a clear and present (not potential) danger, and fashioning a remedy only where the link between the remedy and the harm to be alleviated is beyond dispute and the responsible state government has clearly failed to act. No such showing was made in this case. These circumstances dictate that the District Court should have permitted

Milwaukee to proceed to implement the remedy imposed by the state court according to the schedule approved by that court.

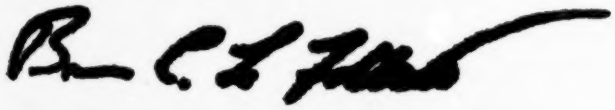
CONCLUSION

The federal common law remedy fashioned by the District Court below was unwarranted in light of the comprehensiveness of the 1972 Amendments to the Federal Water Pollution Control Act. Pursuant to the Act, EPA has prescribed technologically-based direct discharge limitations for all point sources of pollution, and these controls are more than adequate to protect the nation's interstate waters. Moreover, the Act now provides mechanisms whereby both State governments and private citizens can seek direct enforcement of these standards. There is, therefore, no need for a District Court to fashion a common law remedy. It is a well accepted principle of law that federal common law remedies must give way to those prescribed by Congress in comprehensive legislation.

Even if the 1972 Amendments have not preempted the federal common law of nuisance regarding control of pollutants in the circumstances of this case, the District Court should, nevertheless, have deferred to the judgment of the Wisconsin State Court entered pursuant to the State and Federal NPDES requirements. The remedy imposed by the State Court comprised a thorough solution to the identical problem before the District Court. Since this remedy was derived from the federally prescribed standards for water pollution control and imposed to implement congressional policy, basic principles of comity and the federal interest in securing uniformity of decision should have prompted the District Court to defer to the State Court's judgment.

The Court of Appeals' ruling should be reversed insofar as it affirms the District Court's order relating to combined sewage overflows.

Respectfully submitted,



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